Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
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Are we there yet?

THE ROAD TO (TRUE) TRIAL READINESS

Discovery is complete. The motion cut-off has passed. You know your case inside and out. You are conversant in what each witness will say if called to testify, and in the content of all of the documents and other evidence relevant to the case. Your clients are prepared and anxious to conclude the litigation. Are you ready for trial? Maybe.

Trial readiness goes beyond a well-executed discovery plan and preparation of the perfect trial notebook. When you report to your trial courtroom and answer ready for trial, the judge starts with the assumption that you have done everything necessary to marshal the evidence needed to present your case to the trier of fact. No one is going to do a 360-degree evaluation of your discovery plan. Rather, the judge is concerned with the completion of all of the necessary tasks to facilitate an efficient path through trial, from opening statement to verdict.

Judicial perspective

In Los Angeles County, civil cases are generally tried in either a trial court or an individual calendar court. Individual calendar court judges preside over law and motion and manage dockets of over 500 cases each in addition to trying cases. Judges assigned to trial courts preside over back-to-back trials and manage the post-trial proceedings in those cases. Simply put, your trial judge is simultaneously responsible for the fair, equitable and efficient administration of justice in multiple matters during the time you are trying your case. And if your case will be tried to a jury, the judge will be ever-mindful of the personal sacrifice of time and attention jurors make when they report for jury duty. From the judicial perspective, it is imperative that cases going to trial are truly ready before the trial commences.

Your trial judge will likely start preparing for your trial anywhere from two weeks before trial to the first day of trial. So, what do *you* need to do to be ready?

Start early

In most cases, judges set trial dates at the Case Management Conference. (In personal injury cases, there are no Case Management Conferences. The trial date is set at the time the complaint is filed.) This is the time to start your trial plan. The court takes a multitude of factors into consideration when setting trial dates, including the type and subject matter of the action to be tried; the number of causes of action, cross-actions, and affirmative defenses that will be tried; whether any significant amendments to the pleadings have been made recently or are likely to be made before trial; the complexity of the issues to be tried; the trial date or dates proposed by the parties and their attorneys; the professional and personal schedules of the parties and their attorneys, including any conflicts with previously assigned trial dates or other significant events; the amount of discovery, if any, that remains to be conducted in the case; the nature and extent of law and motion proceedings anticipated, including whether any motions for summary judgment will be filed; the nature and extent of the injuries or damages, including whether these are ready for determination; the number, availability, and locations of witnesses, including witnesses who reside outside the county, state, or country; and the achievement of a fair, timely, and efficient disposition of the case. (CRC 3.729.)

Judges take all of these factors and more into consideration when setting the case for trial. Therefore, attorneys should prepare their cases for trial accordingly. "To ensure the prompt disposition of civil cases, the dates assigned for a trial are firm. All parties and their counsel must regard the date set for trial as certain." (CRC 3.1332(a); see also CRC 3.1332(c).) Moreover, the Delay Reduction Act directs judges to adopt a "firm, consistent policy against continuances, to the maximum extent possible and reasonable." (Gov. Code § 68607(f) and (g).) Courts assign trial dates with all of these factors in place. A request for a trial continuance based on information that was available, was known, or should have been anticipated at the time of the CMC is unlikely to persuade a judge to continue a trial date.

Trial policies

Some judges have trial policies governing the way the trial will proceed. In some case types, there are official standing orders concerning trial preparation, such as the Long Cause Trial Package Guidelines (http://www.lacourt.org/division/civil/pdf/LongCauseTrialPkgGuidelines.pdf), the First Amended Standing Order Re: Final Status Conferences in Personal Injury Courts (http://www.lacourt.org/division/civil/pdf/1stAmendedSOre FSCPICrtseff.pdf), the Second Amended Standing Order regarding Limited Jurisdiction Unlawful Detainer Cases (http://www.lacourt.org/division/civil/pdf/2ndAmendedSOLmtdJurisUD EvictionCases.pdf), and the First Amended Standing Order Regarding Non-Collections Civil Limited Jurisdiction Cases (http://www.lacourt.org/division/civil/pdf/2018-SJ-008-001st AmendedSO-CivilLmtdJurisCases D94Eff4-23-18.pdf).

In unlimited civil cases, trial policies are usually discussed at the Case Management Conference. Many judges have standing trial preparation orders and issue them in writing at the CMC. Others have unwritten policies that they discuss at the final status conference.

Trial policies typically include instructions regarding trial scheduling, how motions in limine and other motions will be handled, logistical issues concerning witnesses, how objections will be handled, voir dire, jury selection, opening statements stipulations and closing argument.

If the judge has trial policies and has adopted them as orders, you should take

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them as such. An order is not a suggestion. Violations of trial policies adopted as orders are sanctionable under Code of Civil Procedure section 177.5.

Final status conference

By the time of the final status conference, the court not only expects you to be ready to start the trial, but also to be ready to discuss all of the matters needed to enable the judge to effectively manage the trial. You should be fully prepared to discuss:

Scheduling logistics. Be prepared to disclose any attorney, party or witness calendar conflicts. The judge will decide how they will be resolved and whether a continuance is in order. Also be prepared to give a realistic time estimate for the entire trial. The judge will likely ask for a stipulation and hold you to it.

Dismissals. Be prepared to discuss whether the case is truly ready for trial if there are unserved parties, including unserved Does/Roes. And if there are unserved parties, the judge will likely ask for a stipulation to dismiss them and an explanation of why the case was permitted to proceed to the eve of trial without dismissals.

Amendments to the pleadings. The trial judge will need to know whether the pleadings settled and will inquire as to whether any party plans to bring a motion to amend the pleadings. Whether to permit amendment of the pleadings is left to the discretion of the judge. (Code Civ. Proc., § 473(a)(1).) And because judicial policy favors the resolution of all matters between the parties in the same lawsuit, judges exercise their discretion liberally to permit amendment of the pleadings where warranted. In fact, courts have held that denying leave to amend where "the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense," is not only error but an abuse of discretion." (*Morgan v. Superior Court of Cal. In & For Los Angeles County*, (1959) 172 Cal.App.2d 527, 530, 343 P.2d 62.) If the amended pleading makes substantive changes, the case is no longer at issue and a trial continuance will be required.

Discovery. If there are any lingering discovery issues in need of a ruling, be sure to let the judge know. Be sure to review all proposed exhibits and prepare to address any discovery-related evidentiary issues with the judge before the trial commences. If you plan to object to the admission of your opponent's documents because they were not produced in discovery, be prepared to show the judge the documents were requested but were not produced or properly withheld. Having this discussion ahead of time eliminates the need for breaks or sidebar conferences during trial.

Factual stipulations. Virtually every case has facts to which all parties can agree. Make every effort to reach stipulations to those facts when you can. For example, in a wrongful termination case, if the employer-employee relationship is undisputed, there is no reason the parties cannot stipulate that the defendant was plaintiff's employer. Also think about and be prepared to discuss whether there are any issues of fact that can be narrowed or resolved. Finally, be prepared to identify any disputed preliminary facts in need of determination pursuant to Evidence Code sections 400-405.

Narrowing of legal issues. In addition to entering into factual stipulations, also think about whether any of the legal issues in the case can be narrowed or resolved.

Settlement. Many judges are amenable to sending cases to a mandatory settlement conference on the eve of trial on the theory that, even if alternative dispute resolution has been tried in the past, the parties may be more ready to talk settlement now that discovery is complete and the parties know what evidence will be proffered at trial. Some judges conduct MSCs themselves, and others may send cases for an MSC to a colleague in the same courthouse.

Witnesses. Once trial commences, the judge will focus on the smooth and efficient progression of the trial. Now is the time to raise any issues concerning witnesses that need to be decided. This includes any outstanding issues concerning expert testimony (e.g., whether expert testimony is required in the case, whether an expert is anticipated to testify beyond the scope of the expert witness disclosure, or whether there are any issues regarding potential hypothetical questions) and whether there are any evidentiary issues raised by other witness testimony. If you intend to offer deposition testimony of any witness in lieu of direct examination, exchange transcript page and line designations and engage in a meaningful meet and confer with opposing counsel in advance of the FSC.

Exhibits. Make sure the exhibits have been prepared in conformity with the LASC Local Rules, California Rules of Court and the judge's trial policy. Even if not required by the judge, it is good practice to meet and confer in advance of the FSC regarding stipulations to foundation, authenticity and admissibility. If you do reach any stipulations, make sure they are reflected in the exhibit list filed with the court. Finally, do a review of the exhibit list and exhibit binder to eliminate any duplicate exhibits.

Requests for judicial notice. Are there any pending requests for judicial notice? The judge may rule on them at the FSC or defer ruling until later in the case.

Motions in limine. Some judges decide motions in limine at the FSC, others decide them on the first day of trial. And in some cases, rulings on motions in limine may be deferred until after the presentation of evidence has commenced. Objections to evidence on the ground that the testimony runs counter to a ruling on a motion in limine are more common than they should be. While it may be tempting to try to get testimony excluded by a ruling on a motion in limine in evidence despite the court's order, it is disruptive to the flow of the trial. Attempts to do so in the presence of the jury is clearly improper and will most definitely lead to admonishment by the judge.

Voir Dire. Voir dire is the time for first impressions with the jury. To ensure this first impression is a positive one, it is imperative that you know everything there is to know about how your judge conducts voir dire. No attorney wants to appear unprepared, less than competent

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or even disrespectful on account of the fact they are unaware of the judge's voir dire practices. At a minimum counsel should know: whether the judge has any special practices, rules or procedures; whether there will be any limits on the type of questions to be asked; whether there will be any time limits; whether the judge permits or prefers juror questionnaires; how juror excuses and hardship requests are handled; and what method the judge will use to fill the jury box.

Statement of the case/mini-opening. If your case will be tried to a jury, the judge will build in time for a brief summary of the case before the oral questioning phase of voir dire. If you request leave to make brief opening statements, keep these points in mind: (1) brief means brief – it is not uncommon for the judge to limit a mini-opening statement to five minutes or less; and (2) it should be a brief summary of the facts – not argumentative. Remember, you will have time to present a full opening statement after the jury has been selected and the trial begins.

Proposed jury instructions. The pre-instructions must be finalized before the first day of jury selection. You should also inquire about whether the judge has any policies regarding jury instructions.

Verdict forms. Verdict forms must be finalized before closing arguments. In most cases, the verdict cannot be completely finalized until well after the trial has commenced because the structure and content of the verdict form is informed by the admitted evidence and the final jury instructions. As evidence comes in, be mindful about how it impacts the claims and, consequently the jury instructions and verdict form, so you are prepared to have an efficient discussion about the verdict form before it is finalized by the judge.

True trial readiness

True trial readiness is about more than conducting discovery and knowing the facts and applicable law. From the judicial perspective, a case is only ready for trial when all of the necessary discussions, hearings and rulings have been made to facilitate fluid transitions from one phase of trial to the next, with the least amount of disruption for the trier of fact. In the case of jury trials, that means planning for all contingencies in a way that minimizes the need for sidebar conversations, breaks in the proceedings to accommodate lengthy argument outside of the presence of the jury, and redundancies in the presentation of evidence. Judges understand that tending to these details is not the most exciting part of trying a case. But it does lay the groundwork to allow trial counsel to shine in the eyes of the jury (and in the eyes of their clients).

Judge Michelle Williams Court serves in the Civil Division of the Los Angeles Superior Court where she presides over an Individual Calendar court. 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. 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.