Judge Stephen Moloney
LOS ANGELES SUPERIOR COURT

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What to expect when you are assigned out for your first trial

A LOOK AT A PERSONAL-INJURY TRIAL THAT IS ASSIGNED TO A TRIAL COURT BY DEPARTMENT 1

Trial court vs. individual calendar court

The trial courts at Mosk and the branch trial courts primarily handle personal injury, asbestos and unlawful detainer trials assigned by Department 1. The trial judge is unaware of the issues in your case until it is assigned out for trial. Unlike an IC Court, where the case is handled by the IC judge from inception, a trial judge is just that, i.e., someone who handles the trial and post-trial motions. For the most part IC Courts do not handle personal injury cases unless they are transferred to an IC Court due to the complex nature of the case.

In a PI trial Court, Trial Briefs are not mandatory but can be helpful for the trial judge. If you can summarize your case in approximately five pages, I would recommend you do so.

What needs to happen before you are assigned for trial?

The key documents that must be prepared and certified by the judge in the P.I. HUB Court include the following:

- Statement of the Case
- Witness List
- Exhibit List
- CACI and Special Instructions
- Verdict Form.

Statement of the case

In many cases, the lawyers are able to agree upon a statement of the case, which provides in the first paragraph the plaintiff's position and in the second paragraph the defendants position. They are generally neutral and mirror the causes of action asserted by the Plaintiff and the Defendant's position on liability, causation and damages.

If counsel cannot agree, I will have each lawyer prepare a paragraph outlining their position and after conferring with counsel, will usually accept that version and read it to the jury. As an alternative, Code of Civil Procedure section 222.5 allows for a mini opening statement, which I'm finding is being used more often in personal injury trials. If one of the attorneys requests a mini opening statement, they're entitled to one per Code of Civil Procedure section 222.5. These statements are often helpful in longer trials since they introduce the case to the jury before voir dire. It's been my experience with jurors that there are fewer hardship claims and more jurors willing to serve if they have an understanding of what the case is about before they are questioned.

This is especially true for cases of fifteen to twenty-five days, i.e., asbestos, employment, sexual assault and police shooting cases. The Statement of the case or mini opening is important since it is the initial definition of what the case is about. The Jury Panel of approximately 35 prospective jurors (depending on the length of the case) usually arrives at the assigned trial court around 9:30 a.m. The Judicial assistant (clerk) greets them in the hallway. Roll is taken to assure all assigned prospective jurors are present. The jurors are often nervous. If they have not served before, this is an unfamiliar process. The first 12 jurors on the random list are seated in the Jury Box. The remaining jurors take seats in the courtroom. After a brief introduction, administering of the oath, reading of the statement of the case or mini opening statements and reading the list of witnesses, the voir dire process begins.

Witness list

This is the key document that determines how long the trial will last. I usually add in a day for voir dire plus an additional day for pre and final instruction, plus opening statements and closing arguments. As a result, if there will be eight days of testimony, you would add in two additional days, resulting in a 10-day trial from voir dire to submission for deliberation.

I review with counsel their estimate as to how long each witness will be on the stand. Trial Courts are in operation from 9:00 a.m. to noon and 1:30 p.m. to 4:30 p.m. minus two fifteen-minute breaks. That gives you five-and-a-half hours per day, but you usually lose a few minutes in the morning and the afternoon for late jurors, counsel or other delays, so you can expect to have a little over five hours per day for testimony. This means that, if the lawyers estimate forty hours to try the case, you are looking at an eight-day trial plus voir dire, opening and closing. The jury wants to know when testimony will be completed i.e., when they will begin deliberations. Going through the witness list in detail, name by name and determining the actual amount of time needed allows me to provide that information to the jury. What initially is estimated as a 10-day case might actually be a six- to seven-day case including voir dire and argument after conferring with counsel and obtaining more accurate time estimates.

Going over the witness list name by name focuses the lawyers on how much time they will actually spend on direct and cross plus redirect and re-cross for each witness. I've seen cases involving a rear-end collision where defense counsel will estimate two hours for the defendant's testimony when either the testimony will not occur or it will not last more than 10 or 15 minutes. After we've discussed each one of the witnesses, I add up the amount on direct and cross and add in additional time for redirect and re-cross. Inevitably, the revised number is less than the amount indicated in the pre-trial estimates. On occasion after conferring with counsel, I will divide up

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the time, i.e., 15 hours per side and then put each side "on the clock." This has worked successfully in all cases where I have used this approach and the trial has always been completed in less time than was estimated by the lawyers, i.e., if given 16 hours per side, the lawyers will often finish in 15 hours or less. I find that the more time we spend estimating the actual time to complete witness testimony, the shorter the time estimate becomes in almost every case. Jurors are willing to serve, but they want to know when they will be finished. Time spent obtaining realistic numbers for each witness will provide jurors with knowledge so that they can plan their time accordingly.

Exhibit list

This is another item that I go through in detail with the lawyers. I read through the list to see what type of exhibits are involved, i.e., photographs, medical records, expert reports, CVs, etc. The reason for this is to reduce sidebars to argue admissibility. If we can limit the number of sidebars, we will shorten the trial, which will decrease jurors' frustration. Jurors simply don't like sidebars. I find that by going through the exhibit list, many documents are not objected to after review and discussion. For those that are objected to, we can have a discussion at the pre-trial conference after the case is assigned to Department 41 and in most cases, it then comes down to a few documents that I have to rule on based on *People vs. Sanchez* or other issues that relate to those items of evidence.

I also ask the lawyers each evening to go over the exhibits for the following day so that they can once again avoid sidebars by addressing objections at 4:30 p.m. or 8:30 a.m. the next morning. Obviously, you don't have to reveal the documents you will use for impeachment, but by reviewing the exhibits, it allows me to determine if there are any issues that I need to rule on before the following morning. The jury wants the Trial Judge to manage the case from a time perspective. Done effectively and fairly toward both sides, time management can focus everyone on the key issues and evidence needed to decide the case.

CACI and special instructions

This usually isn't a problem. Once I see the packet of CACI and Special Instructions, I have the lawyers go through them together, outside of my presence, to see where they actually disagree. I then go through the packet myself and give tentative rulings. Obviously, some of the instructions can't be ruled upon until we see what evidence is introduced. That applies primarily to special instructions which are case- and fact-sensitive. I find the process focuses the Court and counsel on the law that applies to the case, which focuses direct and cross on the key issues in the case.

Verdict form

This is another item I go through before we call a panel. It's rare that the verdict form is agreed upon before the lawyers arrive in Department 41, but oftentimes many of the questions have been agreed upon. In most personal injury cases a general verdict or a general verdict with special interrogatories will suffice on the issues of negligence, substantial factor and damages unless there are additional issues to address.

Motions in limine

In certain cases assigned to a trial court by Department One we see as many as one thousand pages representing attachments and exhibits to motions in limine. Obviously, that's the exception and not the rule. When I receive the binders setting forth the motions in limine, I determine how many are filed by the plaintiff and the defendant. I then read the title to each motion and then ask the lawyers to meet and confer in the courtroom while I go into chambers to see which motions in limine are actually in dispute. This is especially helpful since oftentimes the trial lawyers have not prepared the motions in limine and once they look at them, they see that these are not issues that will come up at trial or do not require a ruling.

Once I know the motions in limine that are in dispute, I then determine how long I'll need to read them, i.e., one hour, one day or more. That will delay the trial, but cannot be avoided. Some lawyers expect to call witnesses a day after they arrive in a trial department, which may not be realistic depending on the amount of time that has to be spent on the pre-trial including rulings on motions in limine. Most motions in limine seek to preclude a witness's testimony or exclude certain opinions. By identifying the key motions in limine, the Court can concentrate on the motions in limine that are important to both sides which may, in some cases, reduce the number of trial witnesses.

Voir dire

Code of Civil Procedure section 222.5 specifies that the trial judge shall conduct an initial examination of the panel. After the trial judge has completed his or her examination, counsel have the right to examine prospective jurors within reasonable time limits prescribed by the trial judge subject to the statutory requirements of Code of Civil Procedure section 222.5. In Department 41, I ask initial questions which are listed on the wall behind the witness stand. In addition, the judicial assistant passes out 15 questions to the prospective jurors when they arrive outside the courtroom. Subjects covered include the following:

- Will you have any difficulty following the law even if you disagree with it?
- Do you know anything about this case?
- Are you a lawyer?
- Do you have any relatives or close friends who are or have been lawyers?
- Have you been involved in a court matter as a witness, plaintiff, defendant or expert?
- Do you feel that you, a relative or friend were unfairly treated by the legal system?
- Will you have any difficulty applying the same standard to judge the witness's testimony regardless of who the witnesses are?
- Do you have any feelings about this particular case that would make it difficult for you to be fair and impartial?

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• Will you have any difficulty keeping from discussing the case?
• Will you have any difficulty keeping an open mind?
• A party attorney or witness may come from a particular national, racial or religious group or may have a lifestyle different from your own. Would that fact affect your judgment or the weight and credibility you would give to his or her testimony?
• Each attorney has the right to object to evidence offered. Would you disfavor the attorney or their client if they objected?
• Each attorney has the right to excuse prospective jurors without showing cause. Would you disfavor the attorney or his or her client if they excuse a prospective juror?
• Do you know any reason why you would not be completely fair and impartial in this case?

After the initial background questions are answered and the jurors respond to the 15 questions (see above), I then inquire further with about 15 to 20 questions that apply to the facts in the case, i.e., asbestos, medical malpractice, sexual assault; automobile accidents; slip and fall or trip and fall, etc. Counsel then question the prospective jurors. As the code provides, an improper question is "any question that, as its dominant purpose, attempts to precondition the prospective jurors to a particular result; indoctrinate the juror or question the prospective jurors concerning the pleadings or the law." I also refer to the case of *Rousseau v. West Coast House Movers*, (1967) 256 Cal.App.2d, 878 where the appellate court said: "It is not a function of the examination of prospective jurors to educate the jury panel to the particular facts of the case; to compel the jurors to commit themselves to vote a particular way; to prejudice the jury for or against a particular party; to argue the case; to indoctrinate the jury or instruct the jury in matters of law." I tell the lawyers that they usually won't draw an objection if they are eliciting information from the prospective jurors as opposed to imparting or providing information. On the issue of actual bias, I look to see whether the prospective juror has the existence of a state of mind in reference to the case or any of the parties which will prevent the prospective juror from acting with entire impartiality and without prejudice to the substantial rights of any party. In arriving at my decision, I examine the individual responses of the prospective juror along with the totality of their responses and also consider their demeanor.

Questionnaires

I'm starting to see a trend away from questionnaires because they can delay the start of trial. For example, in an asbestos case, if the lawyers want to use a 50- or 60-topic questionnaire, then on day one you have to call fifty prospective jurors. You then pass out the questionnaire and handle hardships. Assuming you lose 20 to 25 of those jurors because the trial will last 20 to 25 days, you then have them return on Wednesday after their first appearance on Monday. On Tuesday, another panel of 50 arrives and you go through the same process. You don't start the voir dire process until day three, i.e., Wednesday, when you could have started the process after hardships were completed if there was no questionnaire.

In the usual personal injury trial there are six peremptory challenges if there are just two sides or eight peremptories if there are more than two sides plus one peremptory for each alternate juror which would mean in the standard case you would have two alternates and two peremptories for the alternates. *Batson/Wheeler* challenges are not frequent in civil but when they occur, I handle them in chambers consistent with *People vs. Gutierrez* (2017) 2 Cal.5th 1150. We then go through the three-step process when one side makes a Batson/Wheeler challenge. If counsel for the plaintiff makes a challenge, then they must make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose as to the peremptory seeking to excuse the juror.

Once I hear the position of counsel for the plaintiff, and assuming that plaintiff's counsel has made out a prima facie case, the burden shifts to the defense to explain adequately why the juror was excused by offering a permissible neutral justification for the peremptory challenge. If a neutral explanation is tendered, the trial court must then decide whether the party that opposes a peremptory challenge has proven purposeful discrimination, i.e., racial discrimination, etc. The court has to decide whether the peremptory challenge was exercised for reasons other than impermissible group bias. In many cases the critical question to determine is the persuasiveness of the attorney's justification for the peremptory challenge along with the responses of the prospective juror.

Opening statement

Assuming that a mini opening statement occurred, then the opening statement is an amplification of what was said prior to voir dire. I will allow a limited number of exhibits to be used during opening statement and to that end I have the lawyers meet and confer. In most cases they can agree upon a few exhibits that will be used to explain the plaintiff's and defendant's side of the case in opening statement. I always remind the jury and the lawyers that opening statement is not an opportunity to argue the case. If there's an objection, I will tell the jury that in a week or so the lawyers will have an opportunity to explain the evidence and argue all reasonable inferences, but today they're here to tell you the story in this case from their perspective.

Calling trial witnesses

I allow for two rounds of questions, i.e., direct and cross and redirect and recross. Unless there's some extraordinary reason, I won't allow a third round of questioning since it's usually just to emphasize a point one more time that was covered on direct or cross. When the first witness is called pursuant to Evidence Code section 776, I explain what that means to the jury since they have no idea what the Evidence Code section means.

Exhibits

Exhibits can be moved into evidence during the trial, but if it's going to

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require a sidebar, we'll take it up at the break. I always put on the record that the lawyers rest subject to the admission of their exhibits, so they're not prejudiced if they fail to move them into evidence. Usually what happens is that at around 4:30 p.m., when we break for the day, the lawyers will move three or four additional exhibits into evidence from that day. This makes it easier on the judicial assistant since many of the exhibits have been received and marked by the last day before final argument.

Hardships

I remind the lawyers that I'll handle hardships. In a five- to seven-day case hardships are not a significant problem. They increase as you go into double digits and go up significantly when you approach twenty days. I question each prospective juror in the courtroom outside of the presence of the other panel members. If there are sensitive issues, I'll move the questioning into chambers with counsel and the reporter.

Objections

I advise counsel to avoid speaking objections. If they occur, I will frequently interrupt to ask for the legal objection and then rule on the legal objection. The first time a lawyer objects as leading or argumentative I will explain what those terms mean to the jury. I usually have live note available to review. I will pause to read the question and answer if there is a motion to strike and then rule on the motion.

End-of-day issues

It's important for trial counsel not to be rushed at 8:30 a.m. when they arrive at court. As a result, we spend some time between 4:30 p.m. and 5:00 p.m., if necessary, to go over issues that may arise with witnesses the following day. This avoids a delay in starting at 9:00 a.m. the following day and frequently avoids the need to prepare briefs on issues that can be addressed orally that evening. Often it comes down to whether a document can be used on direct. I also want this to occur to avoid having to make the jury wait in the hallway while I read both sides' briefs, which can delay the trial past 9:00 a.m.

Exchanging of names 24 hours prior to calling a witness

At the end of the day I will go over the names of all of the witnesses who will be called the following day and if I'm unfamiliar with them, I'll ask for an offer of proof, so I have some idea of what subject matter they will cover and whether there are any issues beyond those addressed in my rulings on the MIL's.

Sidebars

As indicated above, I try to avoid sidebars if at all possible. I'll meet with counsel during our fifteen-minute breaks in the morning and afternoon and if necessary over lunch and also at 4:30 p.m. or 8:30 a.m. That allows them to make a record and avoids a delay in the trial with frequents sidebars.

Video tape depositions

This is handled during the pre-trial after the case is assigned from Department 1. If there are depositions that need rulings, I'll do so, but we won't call a jury until that's been completed, so it is important that all video tape depositions
are ready to be ruled on when you are assigned out from Department 1.

The last names only

I remind counsel under Los Angeles County Court Rule 3.96, only the last name of a witness may be used except in cases involving children.

Conclusion

Your trial starts once you are assigned out from Dept. 1. If your pre-trial documents are ready, the process should move forward smoothly for both sides in the case.

Judge Stephen M. Moloney attended the University of Santa Clara for both his B.S. (1971) and his J.D. Degree (1975). After graduation, he began his legal career in 1975 at Gilbert, Kelly, Crowley & Jennett where he remained for 34 years until his appointment to the Los Angeles County Superior Court in July, 2009. While in practice, he served as President of the Association of Southern California Defense Counsel in 1992, and became a member of ABOTA in 1989. Since his appointment to the Court, he has served in Criminal (2009-2010), Family (2010-2014) and Civil assignments (2014-2019). He currently is assigned to Dept. 41 at the Mosk Court House handling civil trials.