Judge Michael L. Stern
LOS ANGELES SUPERIOR COURT

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"Judge Bowling Ball," was an unfortunate characterization for me to use for the judicial officer presiding over my first jury trial.

Lessons from my first jury trial and error

JUDGE STERN RECALLS HIS BAPTISM UNDER FIRE AS A FEDERAL PUBLIC DEFENDER IN AN UNLAWFUL DETAINER EVICTION ACTION IN FRONT OF AN IMPATIENT JUDGE

Trial lawyering is hard work. Anyone who says differently has never looked into the eyes of twelve jurors and asked for a verdict. Success at trial depends on preparation, persuasion, personality, and, sometimes, just plain luck. Perfecting trial skills takes practice and persistence. Every trial lawyer has to start someplace. This is how I did it.

Becoming a trial lawyer

My first several years in practice were with California Rural Legal Assistance (CRLA) in Santa Maria, California, where I represented farm workers and rural poor people. Our practice was a combination of impact cases that often went to the highest appeals courts and individual matters involving field conditions, unlawful detainers, contracts and administrative hearings. "Trial" usually meant a non-jury proceeding.

When my CRLA tenure had approached nearly three years, I got the "Clarence Darrow itch" and decided that I would attempt my hand at trying cases before juries. One day in early August 1975, quite out of the blue, I received a call from Los Angeles Federal Public Defender John Van de Kamp. He said that he had heard from a former CRLA colleague that I might be interested in federal trial work and in applying for a positon with his office. Within days, I interviewed and accepted a position with the FPD in smoggy Los Angeles, a city I never dreamed my legal career would take me.

This dramatic change in professional direction coincided with representation on an unlawful detainer eviction case. This matter offered the possibility of a jury trial in which I might assert the relatively new habitability defense under *Green v. Superior Court* (1974) 10 Cal.3d 616 (breach of the warranty of habitability

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reducing rental value may be raised as a defense in an unlawful detainer action). I jumped at the opportunity to get a head start on my ambition to become a trial lawyer. Little did I realize how much I would learn from my mistakes and miscalculations in my first attempt at presenting a jury trial.

Gathering the evidence

In this instance, client Mr. Garcia presented a summons and complaint on an eviction action that alleged that he was behind in rent. An answer was filed and I received a notice scheduling a trial date a couple of weeks later at the San Luis Obispo Municipal Court in Grover City, near Pismo Beach.

From my earlier experiences in defending evictions actions, I knew that getting a personal lay-of-the-land by visiting the subject premises was vital. So I went out to visit right away.

Client Mr. Garcia was a primarily Spanish-speaking farmworker on disability due to a field accident, who lived with his wife and their four children, daughters, ages about five, four and two and a son, barely a year old. They occupied a dilapidated one-room cabin, near the 101 freeway in Nipomo. It was one of a dozen such cabins that appeared to have been part of a long-neglected former cottage motor court, perhaps built in the early automobile motoring days in the 1920s.

The Garcia's cabin was the closest to the busy freeway, located on a slope that bore indications of having taken the brunt of rain run-off that flowed beneath the floorboards of the foundation-less building. The single room had a small restroom built out in a corner. A counter was fitted with a bunged-up metal sink and a hot plate for cooking. Two twin beds took up much of the floor space.

The place was in bad shape: interior walls were streaked with water from a leaky roof; mold was visible in a couple places; a bullet-size hole graced one of the several cracked windows; some gaps in the floorboards were large enough to reveal the ground below; and heat was supplied by a small, inadequate electric space heater. Notwithstanding these glaring deficiencies, the cabin was neatly maintained.

During my initial visit, Mr. Garcia mentioned that his neighbor in the next cabin had been served with a similar eviction action and wanted to speak with me. I met potential client Gordy, a skinny fellow with shoulder-length blond hair, a toothy grin that revealed missing front teeth and a smile that would not stop. I never pinned down the name of his partner whom he invariably called "My Old Lady." She was a huge woman clad in a beat-up motorcycle jacket. Her generous chin showed a slight day-growth of dark stubble. I surveyed the inside of their cabin, noticing similar habitability issues as with the Garcia's. But there was so much junk piled inside that I could not evaluate the condition of the floors.

Gordy was the named defendant on the eviction complaint. I signed him up as a client on the spot. He and his "Old Lady" then sped off on his chopper, her wild hair waving in the wake of a cloud of dust. Neither had a helmet. I got Gordy's answer into court and posted jury fees. I soon received a notice setting both trials at the same time.

Know the law and procedures

Up to that time, I had not only never tried a case to a jury, I had never attended a jury trial nor even spoken to anyone who had. As I had been too busy doing other things in law school, I had not taken a trial practice class. So what to do to prepare for my first jury trial?

I was relieved to discover the recently published *Trial Handbook for California* by James Brosnahan in our office library. It became my trial bible. Authored by one of California's premier trial attorneys, the book contains every aspect of a jury trial, from trial prep to closing. Mr. Brosnahan would be my silent mentor. I read his book cover to cover, compiled my trial notebook and gained confidence that I could present a persuasive habitability defense to a jury.

There was not a lot of legal research to conduct. The *Green* case was fairly new and had hardly been cited. There was not yet any legislation concerning the mechanics of a habitability defense. So I readied myself by whipping up witness and exhibit lists, fashioning jury instructions and outlining a special verdict form. I called opposing counsel, who reacted with amusement to my proposed exchange of trial documents for a jury trial in an eviction case. I was unsure whether he thought that I was out of my league or, perhaps, out of my mind.

Gearing up

While thumbing through the *Trial Handbook* chapter on demonstrative evidence, the quixotic idea of asking the trial judge to take the jury to see the "scene of the crime" popped into my head. But the practicality of transporting the jurors some miles away from the courthouse to examine the two cabins caused me to quickly dismiss that notion.

Mr. Brosnahan's suggestions of how to present photographs were more realistic. Thinking that it would be best to have a third party take the photos, I contacted a local photography student who had once volunteered to help out. I arranged for him to meet with the clients and gave him general instructions on what to take, including my clever idea of placing a ruler next to the holes in the floors.

Preparing the clients

Preparing clients for trial is one of the hardest parts of trial lawyering. Many cases rise or fall depending upon a client's credibility and demeanor. The client preparation advice in the *Trial Handbook* was sensible: explain and practice direct and cross-examination with the clients; discuss the courtroom environment; and emphasize appearance, including how to dress appropriately for jury appeal. This sounds good on paper. But it is the "real deal" that counts.

I worked to prepare Mr. Garcia at his home. With his children running circles around us, I was unsure whether he grasped all of my instructions. But he was sincere in cooperating. It alarmed me that I could never find Gordy and his "Old Lady" at home. Mr. Garcia told me that they were either "in church" or out

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riding the motorcycle. Although Gordy said that he had a part-time job at a packing shed, I was never really certain about that. Nonetheless, the thought of dropping him as a client did not occur to me. I just crossed my fingers, hoping that he would show up.

After some prodding and sweating it out, my volunteer photographer came through with a large stack of 8 x 10 black and white photographs, albeit on the evening before trial. As he had provided his work gratis, I figured that I could not complain. I barely had a chance to sort through the pictures before loading them up with the rest of my materials and heading out the following morning.

Know your judge

The notice of trial from the Municipal Court in Grover City (adjacent to Pismo Beach) had led me to believe that the presiding judge would be kindly Judge Johnson. I had appeared before him in that single courtroom satellite palace of justice and had always felt comfortable with his pleasant judicial style. Arriving early before any of my clients, I was somewhat startled to learn that a visiting retired judge would be presiding. Before long, the clerk called opposing counsel and me into chambers to discuss the case.

It did not take me very long to conclude that I was in for some rough sledding. Seated behind a desk in chambers was a big, barrel-chested fellow who looked like he could have played linebacker for the LA Rams. This certainly was not Judge Johnson. Far from it. I was struck by the judge's perfectly symmetrical round bald head, centered on his broad shoulders. I said to myself, "This is Judge Bowling Ball," an unfortunate characterization for me to use for the judicial officer who would preside.

Without further ado, His Honor gruffly demanded, "What's this case all about?" I briefly explained that it was a jury trial of an unlawful detainer against two families involving a habitability defense. Judge Bowling Ball bellowed back at me, "A habitability defense? I've been doing evictions cases for over twenty years and never heard of such a thing. What's going on here?" I offered a brief overview of the *Green* case and pulled a copy of it out of my trial notebook for him. He glanced at it and said, "Okay. You want a jury trial, then you'll get a jury trial. But I'm telling you, my wife is waiting for me at the beach in the mobile home and she doesn't like to be kept waiting."

I gulped and absorbed his next demands: "What's your evidence? What are you going to put on? We don't have all day." I replied that my clients would offer testimony and photos to show that the conditions of the premises were so bad that the cabins had no rental value. He shot back, "Let's see those pictures." As I reached for the photos, the judge fired at opposing counsel, "Seen these?" He replied with a sanctimonious innocence, "Why no, your Honor." I apologized that I had just gotten them back from the (volunteer artistic) photographer (who had never returned my many calls) and had not been able to exchange them yet.

I gave sets to the judge and to the plaintiff's attorney. Judge Bowling Ball took hold of the little stack, thumbed through it, and pointed with emphasis at one showing a hole in the Garcia's floor with a child next to it holding a foot-long ruler. He exclaimed, "You can't use these! Half of them have little kids in them. That's prejudicial to the plaintiff." Without hesitating, he opened the desk drawer before him, pulled out a pair of scissors and started cutting the children out of photos. All the while he muttered, "You can't have little kids in pictures that go to the jury. You can't have that. No way."

I was so fearful that he would toss the whole bunch into the wastepaper basket that I was rendered speechless. Plaintiff's counsel remained mute, but it was not hard to read his expression of sheer delight. His Honor handed the mangled pile of photos back to me and said, "Now get out there and get this trial on and over. I'll do the jury selection myself." I could almost hear Mr. Brosnahan whispering in my ear, "Don't let him get away with that. Jury selection is your time to show your stuff and get to know the jurors." Having just endured the judge chop into pieces some of my most critical evidence, I did not feel that I was in a position to object. I backed into the courtroom as fast and gracefully as I could.

Much to my relief, all my clients were seated in the audience with about fifteen potential jurors. The jurors looked about as nervous as I felt at that moment.

All of my clients had confused, apprehensive looks. To my astonishment, however, the Garcias had brought all four of their children. It had not occurred to me to tell them to try to find a baby sitter for the trial. The neatly dressed Garicas had listened to my "wear your best clothes to court" pointer. The three tightly-braided girls looked cute, although out-of-place, in matching red, white and green skirts of the type customarily worn at 16th of September celebrations. Their pretty white ruffled blouses gleamed. The little guy was squirming in his mother's arms.

Gordy and his spouse had not particularly gussied up for the occasion. Sitting together like Laurel and Hardy in the front row behind the counsel table, my biker clients were outfitted in their well-worn leather jackets. Gordy was slouched down in dirty black pants and a wrinkled shirt that cried out "I slept in this."

Picking a jury

Taking a seat at counsel table, I sighed to myself (and to Mr. Brosnahan in absentia), "There goes my extensive preparation of voir dire questions." But who was I, a green barrister at the bar, to argue about jury selection with the judge who controlled the courtroom?

Judge Bowling Ball took the bench and the marshal shouted, "All rise." His Honor summarily announced that the case was about a landlord evicting some tenants and we were off to the races. The victimized-looking jurors rose, raised their right hands and were sworn by the marshal.

It was not apparent to me how the judge would be able to select a jury of "twelve good persons from the community" from an assembled group of only

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fifteen people. As he began calling on them, it soon became clear that he could not.

Juror #1 eyed my clients and said, in a complaining voice, that he had been in property management for years and had filed many eviction actions against "people like this." After a few follow-up questions, Judge Bowling Ball excused him for cause without requesting whether counsel assented.

Juror #2 was asked if she could be fair to everyone. She hesitated, took a long, hard look at the defendants (and particularly the one-year old, now playing on the floor), and inquired, "Why did these people bring their children to court?" The judge said that he had not asked her a question calling for such a response. The juror grunted back, "I really don't think that I can be fair where people don't leave their children at home." Before I could complete my thought that people who are behind in their rent usually cannot afford child care, the judge excused her and she was gone.

Juror #3 dealt a different get-out-of-jury-duty card. She blurted out, "Attorney Stern represented me in my divorce! He did!" I swore to myself that I had never seen this woman before in my whole life. But, in a nanosecond, it dawned on me that she may have been someone whom I had represented on Fridays in default dissolutions in Superior Court. In these proceedings, I met briefly with the clients and told them, "Please answer 'yes,' and nothing else, to each of the four questions that I will ask you and you will be divorced." It took only a couple more perfunctory questions by His Honor to be set free.

Juror #4 appeared most offended that she had been summoned to serve her civic duty. Glaring with disdain from the jury box, she pointed a finger at the Garcias, and pronounced that "*these* people" probably "deserved" to be evicted. I understood her code words. A pattern about "these people," my clients, seemed to be developing. The judge attempted to pull her back into the neutral zone of fairness. But she defiantly stood her ground that people who get eviction notices "ought to move out pronto and be done with it." *Hasta la vista*, dear juror.

And so it went until about 11:30 a.m. By that time, we were down to eight people still sitting in the jury box and no reserves left. Judge Bowling Ball looked totally frustrated. While it gained little for my clients, I was glad that he understood what "cause" meant for excusing jurors. But I said to myself that "cause" was looking more like "be-*cause* no one wants to sit as a juror on this case."

It also seemed plain to me that His Honor did not want to be in that courtroom any more than any of the jurors or, for that matter, my bewildered clients. Undoubtedly, the judge was more focused on spending a sunny day at a certain mobile home by the beach than presiding over this trial.

Biting his lip as he looked at the courtroom clock, the judge mercifully called a lunch break, excusing everyone until 1:30 p.m. He directed the marshal to "round up some jurors for me." Little at that moment did I comprehend the significance of that court order.

Keeping clients in check

Everyone scattered from the isolated little courthouse for the lunch hour. I drove down to the beach to sit in my car for a little serenity and to review my trial binder and examination questions. I wondered to myself, "Things are not going too well. What would Mr. Brosnahan do?" I had his book by my side but realized that its pages contained no solution to that unanswerable question. I now understood why it is said that trial lawyers succeed or fail on their own.

I returned to the courthouse to await the return of my clients and those associated with this evolving train wreck of a trial. The parking lot gradually filled with the cars of jurors whom I recognized from the morning, opposing counsel and his client and the Garcia clan. The latter were doing their best to cope in an embarrassing situation in which all eyes seemed to be taking turns furtively glancing at them or laboring to avoid eye contact all together.

Just as things started to come together for the afternoon proceedings, from down the block and into the parking lot, shot two approaching marshal's cars. The black-and-whites slowed down and inched up to the courthouse. As if ascending from circus clown cars, out crawled eight new prospective jurors whom the judge had ordered to be "arrested" and brought in. I did not recall mention in Mr. Brosnahan's trial practice book of Code of Civil Procedure section 211, which authorizes a judge to pick people off the street, have them hauled to a courthouse and sworn as potential jurors when there is a shortage and "a party's right to a trial by jury [is] in jeopardy."

But here they were: eight good citizens of the community. One of the marshals told me that they had been enjoying lunch at a nearby restaurant when they had been legally dragooned to become jurors. Viewing this totally disoriented group of people, a paraphrase of a candid saying of the day jumped into mind: "Surprise! You're on jury duty." But it did not seem at all humorous.

I said to myself, "This cannot be happening. We now have some of the most angry, unhappy jurors whom the judicial system has ever seen and they are my panel." None of this was scripted in the trial practice book. My next reaction was, "This is not going well. It cannot get worse." But I was wrong. It could get worse. Much worse.

As I stood shell-shocked about the newly arrived jurors, I heard the distant din of a motorcycle. At once, I recognized that chopper. The roar became louder and louder as it got closer and closer to the courthouse. Then they came into view. It was Gordy and his "Old Lady." Even at a distance, I readily recognized Gordy's mischievous, pie-eating grin. His hands were tightly gripping the high handlebars as he gunned the gas for effect. More than amply filling the tail end of the cycle, his companion was holding on for dear life but was obviously excited to be the main attraction.

People cleared a wide path as this spectacle turned into the parking lot.

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Just missing the two squad cars, Gordy reared back and lifted the front wheel off the ground to do a wheelie and came to a stop just short of the courthouse door. He and his disheveled passenger rendered a triumphant "whoop" and ceremoniously dismounted.

Questions leaped into my mind whether they would be arrested or if I would be as well for contributing to their misbehavior on the courthouse grounds. My next thought was, "This is all over. Really over. We're fried." All the good advice that Mr. Brosnahan had offered about managing my clients could not help me out of this mess. The only adage that occurred to me was, "If it can go wrong, then it will go wrong."

When to fight and when to surrender

In all the commotion, I had not noticed that Judge Bowling Ball was standing on a sideline, witnessing the show with everyone else. He may not have heard of a *Green* habitability defense, but he surely knew what to do next. Faster than one can utter the word "settlement," he had opposing counsel and me in chambers to discuss his recommendation on ending this fiasco. At the same time, his mind was probably occupied with more important matters. After all, he still had to contend with She-Who-Will-Not-Wait.

Within half an hour, we had hammered out settlements that were approved by my clients. On the condition of waivers of monetary damages, the defendants would vacate their respective premises within thirty days. Done deal, or so I thought.

About a year later, I asked a fellow attorney who took over the cases from me what had happened after I left the following week for Los Angeles. He told me that the Garcia family had faithfully vacated under the terms of their agreement. It had taken the landlord another nine months to get out Gordy and his "Old Lady," which did not amaze me.

As a Deputy Federal Defender in Los Angeles, I later tried scores of criminal and civil jury trials across the country. I learned from my mistakes in every one of those trials. But what I gained from that first jury trial and error braced me for those unexpected moments that always seem to arise.

Judge Michael L. Stern has presided over civil trial courts since his appointment to the Los Angeles Superior Court in 2001. He is a frequent speaker on trial practice matters. As an attorney, he tried cases throughout the United States. He is a graduate of Stanford University and Harvard Law School.