Brian Dunn
THE COCHRAN FIRM CALIFORNIA

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Exposing the myth that "federal courts are bad for plaintiffs"

WHY I PREFER TO FILE MY POLICE-MISCONDUCT ACTIONS IN FEDERAL COURT

Since my 1995 admission, I have spent my entire career working almost exclusively in police-misconduct litigation, having represented well over 200 plaintiffs in civil-rights cases in state and federal venues throughout the state for over 25 years. The reason I bring this up is because, as compared to other areas of plaintiff's civil litigation practice, single-event civil-rights cases alleging police misconduct are significantly less likely to settle out of court, largely for political reasons, and it is not uncommon for civil-rights cases strong on liability to wind up in trial because of non-existent or very minimal pretrial settlement offers.

In 2019 alone, I went to trial on seven cases, six of which were tried to verdict, five of which were police-misconduct cases, which, although typical in my practice, would be considered way above average to most plaintiff's attorneys.

For the majority of the first 20 years of my practice, I operated under the oft-repeated mantra, "Stay away from federal court." This was repeated so often, and by so many attorneys senior to me, that I blindly accepted it. I began to question this belief following a string of particularly frustrating losses in state court, in 2010 and 2011, in which I was able to directly correlate how and precisely when the evidentiary rulings of the state court judges took the jury away from me.

Primarily out of these frustrations, I started filing civil-rights cases in federal court, without waiting to see whether or not the customary defense tactic of removal would take effect. I began to embrace and thoroughly familiarize myself with federal-court procedures, which, contrary to my prior belief, were surprisingly easy to learn. In fact, because the L.A. Superior Courts' trial procedures seem to have been in a constant state of flux in recent years, I have found the federal way of doing things to be actually simpler and more efficient. And, somewhere along the way, an interesting thing happened: I started seeing some great results. Between 2016 and 2019, I prevailed in 11 out of 13 cases that were tried to verdict in the Central District, and even achieved record damages awards in two police-

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shooting-death cases. (A complete list of all 11 case cites, descriptions, and verdict details can be found at briandunnlaw.com)

Jury selection is totally different – but don't cringe just yet

The "jury must be selected by lunch" rule

Jury selection in federal court is totally different than jury selection in state court. Consider the following question: In a typical state-court personal-injury case, what really happens on the first day of trial? In L.A. Superior courts, the jury panel usually isn't even called up on day one, and the first day is often spent determining where the case is to be tried and before which judge. If the parties can resolve this issue early in the day, the first day may be spent discussing some pretrial issues in general terms in the afternoon. By contrast, in federal trials, the jury panel, consisting usually of around thirty jurors, is seated no later than 9 a.m., and it is a virtual certainty that the entire eight-person jury will be selected, and sworn in before lunch!

Be seated, Counsel

As for the actual process of jury selection in federal court, typically a minimum of 95% of the questions asked of prospective jurors will come from the judge. Most judges invite counsel to submit voir dire questions in advance of trial, but in practice, my experience has been that approximately 13% of the questions I have presented have even been considered, much less asked, to the prospective jurors. There are a growing handful of federal judges who will allow attorneys to conduct a very limited voir dire, but this is typically restricted to a few questions or a few minutes. However it plays out, even with all challenges for cause being thoroughly adjudicated, in my experience the jury is always completely selected and sworn in by the afternoon break. When the jury is sent home at around 4:30 p.m., opening arguments are a distant memory, and two to three hours of testimony will have already been heard.

Peremptory challenges and for-cause challenges

When it comes to de-selecting jurors, the contrast between federal and state court jury selection norms is equally stark, and the federal procedures are designed to deemphasize an attorney's control in shaping a prospective jury through eliminating prospective jurors, as compared to state court. For starters, for an eight-person jury, which is typical, each side will get only three peremptory challenges. That's right, *three*. Moreover, my experience has shown federal judges to be significantly less liberal than their state counterparts at granting for-cause challenges. Understandably, at first blush, these procedures may seem draconian to a plaintiff's attorney accustomed to a jury selection process which typically lasts for several days, before judges who have a low threshold regarding the granting of for-cause challenges, but there's more to the story.

Court-conducted voir dire

Having seen this process play out in dozens of cases, I have come to conclude that my prior assessment that court-conducted voir dire is inherently ineffective and bad for plaintiffs was unfounded. First, and while this may seem patronizingly obvious, the federal court jury selection procedures *apply equally to both sides*. Second, because they have the benefit of decades of institutional knowledge, federal judges are often very capable of exposing jurors' biases without the assistance of attorneys. Because a trial is an inherently adversarial process, the federal judge in that huge cathedral of a courtroom is seen as a neutral and respected overlord of the arena to the jury panel, which often facilitates candor in the panel's interactions with the court, once the ice is broken.

When jurors are exposed to protracted attorney questioning in state court trials, the ethos of the *attorney* takes center stage, which inherently involves the introduction of trial lawyers' theatrical and divergent personality dynamics, subtle and not-so subtle efforts to have jurors pre-judge the evidence, added objections and sidebars, and, of course, *all of that wonderful posturing*, which in practice may have a tendency to complicate the overall mission of exposing the belief systems of biased jurors.

The limited peremptories

Since each side has only three peremptories in federal court, neither side has the luxury of sculpting and refining a jury over days of deliberation, evaluating juror questionnaires, or analyzing the mathematics of how best to rotate favorable-looking jurors into the box from the audience, all of which are attendant to the state court experience. Having tried dozens of civil trials in state courts, and dozens in federal courts, my experience has found the federal process of jury selection causes the first day of trial to be infinitely easier and less stressful than the state-court process.

One practical reason for this is that you don't have to be in full-on gladiator mode until after lunch, which for me has served to take the edge off of the first day of trial, because the judge is going to do all of the heavy lifting in the a.m. session. Along these lines, and while I would not recommend this to everyone, in recent years I have customarily waited until the lunch break to write my 15-20-minute opening statement, with the personalities of the most dominant members of the empaneled jury in mind. As for the frequently asked question of which process is better for plaintiffs, the best answer I can confidently give is that the federal process is *not worse* for plaintiffs, recognizing that both paths to jury selection have pros and cons for both sides.

As for the severe limitations on peremptory challenges in federal court, the practical reality facing attorneys on both sides is simple and can be articulated by the following rule: *Save your precious peremptory challenges for the biggest haters only.* Usually, the most-

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biased jurors will be obvious to everyone in the room after the judge is done questioning and will be the focus of for-cause challenges, with the peremptory winding up being the backup plan for the denied challenge for cause.

In practice, this takes a lot of the guesswork, mysticism, and divination out of the process of jury selection, and takes a gigantic burden off of the attorneys. On a side note, I must point out that for these reasons, paid jury consultants have been completely useless in federal trials in my experience.

The required unanimous verdict has not been a deal breaker

Like most plaintiffs' lawyers, for years I resisted bringing cases in federal court out of a fear that the requirement of a unanimous jury would make it less likely for my clients to get a verdict. My concerns in this regard were entirely understandable, as literally all of my experiences in obtaining large plaintiffs' verdicts in state court trials involving 12-person juries have never involved unanimous verdicts, usually breaking down 9-3 or 10-2 on the important questions.

But a deeper analysis of jury psychology reveals the flaws in my prior logic, which I will attempt to explain: Based on what I have seen (and speaking very generally), a jury wants to make the judge happy, and selected jurors generally want to do right by their fellow jurors who have endured the arduous process of sitting through the entire jury selection process and trial with them, even if they vehemently disagree with, or even come to dislike, some or all of their fellow jurors.

In state-court civil trials, the jury is told before deliberations that nine of them must agree on each question on the verdict form, which allows for those self-righteous minds who find themselves in the minority to stand their ground and "agree to disagree" with the majority, so long as their voting block doesn't expand to four.

In a federal-court action, by contrast, the jury is programmed differently before deliberating, being told at the outset that their verdict must be unanimous on each question. In a typical eight-person federal civil jury, this puts the jurors who find themselves at odds with the majority in a very different position: they must somehow get on board with the majority or cause the entire process to be nullified by holding out, or "hanging" the jury, resulting in the dreaded mistrial.

Because everyone on the jury has gone through the entire life-disrupting process together, this price for standing on one's principles takes on new meaning – the cost of such righteous indignation affects the many, as opposed to the few. When combined with the judge's passive-aggressive cajoling, which suggests with increasing intensity to juries struggling to reach a verdict that *the entire court staff has labored so arduously for so long* to bring this case to them, the ultimate cost of standing on one's principles is too much for most holdouts to bear, and the clear majority (exactly 88% in my experience) of federal juries somehow find a way to reach a verdict. Of course, it is worth noting here that in most civil cases, following a hung jury, both sides are increasingly motivated to settle, which can inure to the benefit of a plaintiff.

Your trial will proceed at warp speed

Imagine the following common scenario: At the pretrial conference two weeks before the trial, the judge begins by dispassionately telling everyone that a strict time clock will be used, and that each side will have *seven hours total* to present their case, which includes time spent on both opening and closing arguments, as well as all direct, redirect, and cross examinations of all witnesses, including experts, and any time a party requests the court to consider any issue while the jury is waiting will be deducted from that party's time.

Upon hearing this, you may think, as did I, the judge is joking, or that the judge is making an extreme statement to encourage the parties not to waste time, or that there is no way that such extreme time limitations would ever *actually be imposed in reality*. Each of these thoughts is wrong. The judge is not joking and is going to hawkishly monitor that clock throughout the trial, even to the point of cutting your argument off mid-sentence if you run out of time at the end. (Ever given a 12-minute rebuttal argument? I was forced to once and everything turned out fine.)

If the thought of being in this situation causes your blood pressure to rise, take a moment and consider the following: How much time do you really need? I mean, *how much time do you really need*? If you keep asking that seven-word question to yourself over and over again, the deep dive into your trial prep engendered by this inquiry will likely reveal some ways to coalesce your ideas and simplify your presentation, which is *always* a good thing for the plaintiff, who goes first and carries the burden of proof.

In fact, because I've tried more cases in federal court in the last five years, in my recent criminal and civil state-court trials, I've marveled at how much time was wasted. Although I would never hold myself out as being anything close to an expert on juries, (and have more battle scars than I would like to admit to attest to this), I can confidently tell you that I have learned a few lessons the hard way, and would like to pass on the following axiom, which I wish I had learned decades ago: The average juror's attention span is much shorter than your think. *Much shorter.* You can take this to the bank.

Along these lines, jurors are very good at appearing to be engaged in the proceedings when they're completely checked out. So, while I would never presume to tell any lawyer how to prepare or try his or her case, having tried well over 50 civil trials to verdict, I tell my young lawyers in the office that, although you probably won't convince the jury to agree with all of the many strengths and nuances of your case that you know so well, *it really only takes a few points to carry the day.* So, in actual reality, seven hours is usually more than enough time, and since we have the burden of proof, that

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egg timer actually helps us more often than not.

Why I prefer federal court – in a word, predictability

In closing, for me it's not just about the attorneys' fees, or the user-friendly audio-visual equipment, or the professionalism of the court staff, or the absence of those annoying clerks asking you for checks at the end of the day; it's about *predictability*. I prefer practicing in federal courts, and before federal judges, because of the predictability of the process. There are only thirty or so judges in the building, and they are there for life.

While it's never possible to be entirely accurate in forecasting how any federal judge is going to come down on any particular issue, you can at least go into the arena with some idea of that judge's track record on each of the issues that are likely to come up in your case, and this is a very powerful tool to have when preparing for trial.

This is not to say that federal judges aren't biased. They can be. Nor am I trying to imply that federal judges have comparatively superior judicial temperaments, because this would not be accurate either. (In fact, a few of them can be downright mean, but at least you know this ahead of time, which is exactly my point.)

These days, I don't so much worry about bad facts, hard-to-prove damages, or less-than-desirable clients, and I fully expect to take some body blows at trial. It's *surprises* that I fear, because there's no game plan for mid-trial surprises, which seem to crop up all too often in state-court trials.

And while federal judges are not perfect, they carry a comparatively higher probability of making legally sustainable rulings, and they usually get the law right because they're familiar with the issues you're facing, having evaluated them time and again. When something novel comes up, you can rest assured that their law clerks are smarter than you were in law school, and you almost never have to worry about a did-he-just-do-that moment cropping up well into the trial, which is an all-too-common occurrence in state court trials before judges who lack an institutional familiarity with the issues presented in your case.

Currently the Managing Partner of the Los Angeles office of The Cochran Firm, *Brian T. Dunn was originally hired in the summer of 1993 as a law clerk by legendary civil-rights lawyer Johnnie L. Cochran Jr., and has worked at The Cochran Firm for his entire legal career, practicing almost exclusively in the area of police-misconduct litigation.*