Judge Mary Ann Murphy
LOS ANGELES SUPERIOR COURT

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Trial tips for the post-pandemic era

JURORS TODAY ARE NOT AS PATIENT, SO YOU NEED TO KEEP THE TRIAL FLOWING

We may be a little rusty after the time away from trials during the pandemic. In my first couple of trials, I forgot to ask the jury the basic questions on the board. But things are also different now. Have you noticed that post-pandemic, jurors do not appear to be quite so tolerant of having their time wasted? Perhaps they do not want to be in the courthouse longer than necessary during Covid times. It is good to be sensitive to the time you are taking with the jury. The purpose of this article is to highlight areas that may improve trial flow and juror attention.

Trial and exhibit notebooks

Many cases originate for the Personal Injury Hub. In those cases, at least two days before the final status conference, counsel must email to the department conducting the final status conference the electronic trial binder. (See, Second Amended Supplemental Standing Order re Covid Protective Measures Related to Final Status Conferences in the Personal Injury Cases at Spring St., Courthouse, filed October 8, 2021.) The parties are required to submit one PDF that includes a joint list of jury instructions and full-text joint and contested jury instructions, joint and contested verdict forms, a joint witness list, exhibit list and deposition designation chart.

The failure to meet and confer on jury instructions and the verdict form wastes time in the trial court and prevents other litigants from accessing courtrooms. If you experience lack of cooperation in compiling the electronic trial notebook, you may wish to advise the judge at the final status conference and request that the judge continue the final status conference for a brief period of time and order counsel to comply with their obligations regarding trial binders. In an extreme case of lack of cooperation, rather than risking a continuance of a trial date, you may wish to consider filing an ex parte application to compel the other side to meet and confer to assemble an electronic trial binder.

With respect to jury instructions, it is best to submit jury instructions in the traditional format with the box at the top, with boxes to check off the party requesting the jury instruction and rulings that the instruction is given as requested, given as modified or refused. If the hub judge prefers a different format, be aware that the trial judge may prefer the traditional jury instruction format. Special jury instructions must include a citation of authority and this should be placed at the top of the instruction, not the bottom. (C.f., California Rules of Court, Rule 2.1055 (d).) If you are unable to obtain a court reporter for your trial, submitting jury instructions in this format will preserve your appellate record as to which instructions you requested and which were given and refused.

In many courtrooms, you will be required to appear on the first day of trial with an original exhibit binder and three or four duplicate binders of tabbed exhibits with each exhibit paginated, beginning at page one. The judicial assistant will retain the original exhibits to tag them. Typically, the original exhibits are sent to the jury room during deliberations. It is best to have duplicate exhibit binders for the judge, your opposing counsel, the witness stand, and for yourself. This will avoid the need to pass documents back and forth and permit a smooth examination that does not break your momentum. When you ask the witness to turn to a particular page in a particular exhibit, everyone will turn to that page at the same time and you will not have to approach the witness stand.

Motions in limine

As soon as you learn the courtroom to which you are assigned for trial, it is best to see that the motion-in-limine binders are delivered to the trial court. The motion, opposition, and reply briefs should be placed in a binder, with an index, so the judge can easily read and rule on the motions.

Make a list of all the evidentiary issues you are concerned about and bring them to the trial court's attention before the jury appears for voir dire, even if you have not filed a motion in limine on the issues. Most judges will appreciate knowing about anticipated evidentiary issues so they can discuss them with counsel and resolve the issues before trial. This will eliminate sidebars and delays in trial that often frustrate jurors.

Be sure to advise your clients and witnesses of the orders in limine so they do not mistakenly disclose excluded evidence to the jury. (Los Angeles Superior Court Local Rule 3.57(e).)

Conduct an effective voir dire

Make the voir dire interesting for the jurors by calling on different jurors and letting them talk. Ask open-ended questions, and when you get a particularly positive or negative response, ask if other jurors feel the same way. Lengthy voir dire, with counsel doing most of the talking and attempting to indoctrinate and precondition the jurors, may annoy your jurors from the start. Jurors are smart and they know what you are trying to do. Asking jurors the same questions, one by one, down the row of jurors, will be uninteresting and you may get the same safe answer from all jurors.

As of this writing, the batch system remains in effect and judges are limited to about 30 jurors per day depending on the length of the trial. In some courts, you should be prepared to voir dire all the jurors at once. A one-half foam-core board and medium sized post-it notes will help you keep track of the jurors. The judge may want to bring the next group or "batch" of jurors in the next day, so be prepared to conduct an efficient voir dire.

Get into the habit of noting the jurors' numbers on the random list, as the jurors will be seated in the jury box in that order.

Excuse problem jurors

If a juror seems annoyed during voir

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dire, this juror may not work well for your client. Learn to read the subtle and not-so-subtle messages jurors send with body language, tone of voice and words. Attempt to stipulate with your opposing counsel to excuse for cause jurors with poor attitudes and jurors who really don't want to be there. These jurors may wreak havoc with your trial. In one case, counsel did not excuse a dentist who obviously did not want to be on the jury. On the third day of trial, the dentist went into the hallway and discussed the case with the other jurors. The entire panel had to be excused.

If the judge will not excuse a problematic juror for cause, don't play chicken with the other side on peremptory challenges; excuse the problem juror. If there are more than one problem jurors, perhaps each side might use a peremptory to excuse them.

Potentially problematic jurors are not always obvious. In one trial with savvy trial counsel, during deliberations the foreperson sent out a note that stated: "Juror number 4 claimed to have used psychic powers in his decision on this case. What do we do?" I don't think anyone saw that coming.

Playing video depositions – strategic considerations

Any party may use video deposition of a treating or consulting physician or any expert witness, even though the deponent is available to testify, if the requirements of Code of Civil Procedure section 2025.620, subdivision (d) are met. The opposing party may counter-designate portions of the deposition that are "relevant to the parts introduced," to be played when you play the deposition in your case. (Code Civ. Proc., § 2025.620, subd. (e).)

If you are considering playing lengthy portions of your opponent's experts' videotaped deposition during your case, you may wish to consider whether the court will permit you to ask the same questions on cross-examination when the opposing expert testifies live. Having the jury watch hours of expert testimony may be an impediment to your effective cross-examination when the expert appears live and the trial judge does not permit you to repeat what the jury has already heard.

Consider whether the testimony you wish to play actually helps your case. Watch the jury as you are playing the deposition excerpts. Are they engaged and paying attention or do they appear bored and disinterested? Or worse, do they seem annoyed?

A party can use for any purpose the deposition of an adverse party or an officer or director, employee or managing agent of the adverse party. (Code Civ. Proc., § 2025.620, subd. (b).) If you are considering playing lengthy portions of your adverse party's deposition in your case, the same considerations apply.

Playing hours of videotape depositions may not always be the best strategy. Use videotape deposition excerpts strategically.

Look at your jurors

You control the level of attentiveness of your jurors by presenting evidence in an interesting and efficient manner. You should be aware of the attentiveness of your jurors at all times. With social distancing, some of your jurors may be directly behind you. Swivel your chair around to observe the jurors.

Watch for sleeping, inattentive, disinterested, or annoyed jurors. This is your cue that you (or your opposing counsel) may be boring the jurors with your presentation. If the judge mentions that your jurors are falling asleep, ask yourself if there is anything you have done that might have caused the juror(s) to fall asleep. A course correction may be needed.

Your jurors may be inattentive or sleeping for a number of reasons. Perhaps you did not prepare for your examination as well as you might have and your examination is disorganized, rambling, or repetitive. Jurors do not appreciate hearing things over and over. They may feel as if you are insulting their intelligence. In one trial, an annoyed juror called out to a lawyer: "We have already heard that."

I suspect that jurors do not care for attorneys who do not get along, causing numerous sidebar conferences and arguments outside the presence of the jury, resulting in trial delays, such as starting late in the morning or after recesses. Jurors are smart and they may determine why this is happening. They may become impatient and disengaged. You don't want your jurors to feel as if they are being held hostage in your trial.

When something comes up during trial, try to work things out with your opposing counsel and present an agreed solution to the trial judge. If argument is necessary, start by telling the judge what you want, that you have met and conferred, and briefly and succinctly state your argument. It is best not to start talking without first telling the judge what you want the judge to do. The judge may agree with you when she learns what you're trying to accomplish, obviating the necessity for argument.

Other potential time wastage during trial can be avoided by not running out of witnesses and ensuring that your technology works by trying it out before it is time to present your evidence.

Proper argument in trial

Judges have been told not to keep jurors waiting in the hall where Covid can spread. We no not want to run out of jurors and have a mistrial due to Covid.

Things come up in trial that cannot be anticipated. Proper trial argument involves presenting succinct arguments *before* the judge rules. It is your job as a lawyer to think on your feet and argue your points. After the judge has ruled, do not argue with the judge about the ruling. This will make your arguments more efficient, while preserving your appellate record and your jury will not be annoyed because they are waiting in the hall.

Know the Evidence Code

It is essential to know the rules of evidence, what is hearsay, non-hearsay,

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and the exceptions to the hearsay rule. The Evidence Code is an important trial lawyers' tool. If you are not offering something for the truth, be prepared to tell the trial judge the purpose for which you are offering the evidence.

Have a copy of the Evidence Code with you. This will enable you, for example, to quickly turn to Evidence Code section 1271 and ask three or four questions to prove the business-records exception.

A good reference work on non-hearsay is chapter one of Jefferson, California Evidence Benchbook (CEB 2009). An excellent reference work on evidence is the second volume of Wegner, et. al., Civil Trials and Evidence (Rutter Group 2021). This treatise is also excellent on post-trial motions and costs and is a go-to for many judges.

The best reference I have seen for laying foundation in California state court is Imwinkelried, Leach, California Evidentiary Foundations (4th ed. 2009). Even if you are an experienced attorney, reading this book will sharpen your trial skills and knowledge of the Evidence Code.

A backup plan to get your evidence in

Skilled trial lawyers do not evince frustration when a judge sustains an objection. They quickly and quietly turn on a dime and get the evidence in another way. Typically, there are a number of ways to get evidence before the jury. A knowledge of the Evidence Code makes this an easy task.

For instance, your trial judge may not permit you to board your numbers in voir dire or to anchor, bracket, indoctrinate or precondition the jury by telling them in voir dire the numbers you will board in your closing argument. If so, be prepared to question jurors in a different way to discover their views on awarding damages. There are many ways of discovering the jurors' views on damages and whether they would impose a cap on damages.

If the trial judge sustains your opponent's objection to the use of disputed exhibits in your opening statement, be prepared to paint a verbal picture or use a diagram or other illustration.

In opening statements, sometimes counsel do not provide a simple illustration of the scene of the accident or a timeline of the events in the case. If you are giving an opening statement in an auto accident case, at a minimum, you should draw a diagram on the butcher paper in the courtroom, as jurors are likely a mix of verbal and visual learners and the diagram will be appreciated by the jury. If chronology is important, as it is in most cases, you can present a timeline on the butcher paper or on paper placed on an Elmo. This will provide a frame of reference for the jury. Be sure to give the note takers on the jury a chance to copy your illustration or timeline.

Playing lengthy videotapes in opening statement may draw an objection and, if you cannot play your video clips in opening statement, you should be prepared to tell the jury the substance of the testimony during your opening statement.

Collegiality with opposing counsel

It is essential to have a good relationship with your opposing counsel. For example, you may wish to negotiate using exhibits in opening statement, admission of exhibits and other issues that arise during trial. Many skilled attorneys approach each other during trial to quietly work out issues. Whenever possible, meet and confer on issues before you bring them to the attention of the court. The jurors see and probably appreciate professional behavior just as they may grow weary of combative counsel.

Judges appreciate professional counsel who get along with each other and make the trial a more pleasant experience for everyone in the courtroom.

If you are not successful or do not beat a CCP § 998 offer, a good working relationship with your opposing counsel will help your efforts to negotiate a dismissal for waiver of appeal with each party to bear its costs. You might even consider protecting your client by negotiating an agreement regarding costs before the trial begins, just as you would a high-low agreement. An amicable relationship with opposing counsel may help protect your client from losing the case or not beating the CCP § 998 offer and having costs awarded against him.

Good relationships with opposing counsel will make your life easier on many levels and will help you achieve better outcomes for your clients.

Taking cues from the jury

Watching the jury and taking cues from their level of attentiveness will improve your trial skills. Be prepared to effectuate quick course corrections if it appears that the jury may be losing interest in your presentation.

Judge Mary Ann Murphy is assigned to a trial court at Spring Street, Dept. 4. She has been a judge of the Superior Court for more than 28 years. She was an associate editor for Weil and Brown, Civil Procedure Before Trial for seven years. Judge Murphy is a member of the Irish Legal 100, has served five terms on the Court's Executive Committee, and had taught and moderated numerous programs for judges and attorneys. Judge Murphy enjoys adventure travel, particularly travel in the polar regions.