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Trials and Tribulations

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Trials and Tribulations

By

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Being a Useful Compendium of Advice for the New Lawyer and the Lawyer, Not So New, Who Perhaps Has Not Been In Court Very Recently, Including Certain Interesting Items Not As A General Matter Considered In What Passes for Law School These Days

George Washington, sometime before the age of 16, transcribed **Rules of Civility & Decent Behaviour In Company and Conversation**. (Original errors in numbering have been corrected; original spelling is unchanged.) A few excerpts follow:

1st: Every Action done in Company, ought to be with Some Sign of Respect, to those that are Present.

61st: Utter not base and frivilous things amongst grave and Learn'd Men nor very Difficult Questians or Subjects, among the Ignorant or things hard to be believed, Stuff not your Discourse with Sentences amongst your Betters nor Equals.

73d: Think before you Speak pronounce not imperfectly nor bring out your Words too hastily but orderly & distinctly.

74th: When Another Speaks be attentive your Self and disturb not the Audience if any hesitate in his Words help him not nor Prompt him without desired, Interrupt him not, nor Answer him till his Speech be ended.

86th: In Disputes, be not So Desireous to Overcome as not to give Liberty to each one to deliver his Opinion and Submit to the Judgment of the Major Part especially if they are Judges of the Dispute.

Introduction

When the trial lawyer first walks into a court room for trial, he or she becomes part of a conundrum. The lawyer cares, deeply, about who wins or loses. The power of witnesses' testimony, whether a document is admitted or not—such are the foci of the lawyer's attention.

But the judge does not care.

The judge has not the slightest interest in who wins or loses, whether a document is admitted, or a witness testifies well, or at all. The judge wants to get the process right, without regard to result. The judge wants the jury to be comfortable, witnesses to be ready to testify when called, and for there to be as few interruptions to the smooth operation of the trial as possible.

Trial lawyers, à la Perry Mason, like surprises (as long as they are not on the receiving end). Judges do not. Lawyers want their evidence in, and the opponents' evidence out, without regard to the rules of evidence; and it is wonderful when a hearsay exception is held to apply only to one's own document, and not to those of the other side. The judge only cares about whether something is admissible, and uses the same criteria regardless of the proffering party. Generally, the lawyer wants days, weeks, months indeed to put on her case and without constraint; the judge won't let that happen. Some judges, god bless 'em, even use chess clocks to time a case down to the minute.

And then there's personality. Lawyers usually have been living with each other for years before the date of trial. Or it may feel as if they have: there may have been ugly discovery disputes, declarations of questionable accuracy, and massive logistical problems in setting depositions. Lawyers showing up for trial bring boxes of documents, the product of interminable wrangling, delays and outright obstinacy—caused, always, by the other side. The judge, by contrast, is not heir to these misfortunes: She is bright and cheery, and welcomes both sides with pleasure. Does she know nothing of the last two and half years of abuse? Frivolous summary judgment motions? Failures to return calls? Sanctions motions? It is true. She knows nothing; and unless truly, truly compelled to learn it by reason of some pre-trial motion, she will learn nothing of that unfortunate past.

To a lawyer, it may often feel as if the judge is more interested in, say, witness availability than the substance of the testimony. Actually, this is often true. As long as the testimony is admissible, the judge couldn't care less. Lawyers may be shocked when an exhibit—say, a computer generated reenactment—is excluded after they have spent $200,000; as if the court were oblivious to the waste. 'As if' is right: The Evidence Code does not list cost of an exhibit as a factor for admissibility.

There are few judges, though, who have entirely forgotten their time as trial lawyers (if they were fortunate enough to have that background). Even after years on the bench, some of us may lean forward, just a little, to ask a killer question on cross examination, only to take a deep breath and lean back. We imagine giving closing argument, of course so much more focused and

piercing and persuasive than that given by the lawyers. We know what it is like to schedule five experts witness in a row: The experts are always from out of town and charge for travel time, much like a buttered slice of bread always lands butter side down.

But despite the memories, judges and lawyers have different interests at trial, and this is the conundrum. While judges remember what it is to practice law, most lawyers have little idea of what it is to be a judge. This guide is designed to bridge that gap. Here's what things look like from the other side of the bench. Most of the suggestions are, once written out, *blindingly* obvious, patently common sense. But for lawyers wrapped up in the moment, juggling pretrial motions, preparing witnesses, or dealing with the apparent loss of a key document, these matters are often forgotten.

But they should not be forgotten. Everything goes so much more smoothly and comfortably if lawyers would only attend to these hints—paving the way, indeed, for the judge and jury actually to attend to the merits of one's case.

It's true. When counsel are professional, well-prepared, courteous to the court and others in the room (including other lawyers), then do we have the space for the skilled and experienced lawyer to flourish, able to draw the fact finder to her cause, and persuade, free of distraction.

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This is the stuff they don't teach in law school.

Most of these helpful hints are just common sense, and are simply means to make it easy for the judge (or jury) to see things your way. A few random examples. Why would you speak softly to the back wall when arguing a motion? Why would you be late every morning, causing the jury to wait for you? Why would you file 35 *in limine* motions, risking a meager few minutes examination of each, when two of them are complicated and very important—and 33 of them are innocuous? Why would you be condescending and rude to the judge? These are not everyday behaviors, but they are common enough, and they betray an attorney who has lost sight of his or her goals.

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A final note. There's a lot of "don't do this, don't do that" in these tips. I don't mean to sound querulous. I have tried to moderate any tendency towards petulance with more lighthearted descriptions and suggestions. And that's all these are-- just suggestions. There's no legal advice here, and only a few references to law as such (sometimes I have to: I mention hearsay a lot). Other judges and lawyers have their own list of dumb stuff lawyers do in court, and many will disagree with many of my suggestions. Send me your pearls of wisdom to feed my prurient interest, and for the next edition (if there is one).

I certainly don't mean to suggest all lawyers make the mistakes I discuss; it's really only a small handful, and as the sub-title of this section suggests, they tend to be the least experienced (obviously). Alas, as we say with those that voluntarily attend the wide spectrum of continuing

education classes given across the state: it's probably the very people who *don't* read this that should.

1. Judge's Prerogatives & Courtroom Courtesy

The judge.

Why do we have to have "dignity, decency, order and respect"? Not because judges are gods or lords of the realm, but because these "are essential to the proper administration of justice….." *Blodgett v. Superior Court*, 210 Cal. 1, 14 (1930). We honor the office because otherwise we can't have fair and efficient trials; it's the way we avoid chaos and the triumph of noise over order and information. Lawyers who forget the "why" of courtroom decorum are literally making things personal, as opposed to professional. The following suggestions are just extrapolations of that guidance:

Don't interrupt the judge. However, the judge may interrupt you; *let the judge do so*. The judge is trying to get you to focus on something the judge thinks is key to the decision; don't you want to know what that is?

"When a judge says 'Is there anything else?' he often means "I'm done." Know when that is, and add only critical argument not previously made. Briefly.

Don't embarrass the judge, who may be a casual acquaintance or someone you've had in a prior case, in front of opposing counsel by assuming familiarity or referencing common friends. Opposing counsel doesn't want to be "home-towned" and the judge doesn't want opposing counsel to think that's what's going on. It's also just distasteful. (It's true that judges should disclose any prior connections which a reasonable person might think could go to the issue of disqualification, but that's usually the judges' call, and they are pretty good at making a brief record on the subject.)

Don't say you're going off the record. Ask the judge to go off the record.

Do not address the court staff (while court is in session) without permission from the judge, including asking them to do a task for you such as look something up in the docket or the computer. If your judge has you mark exhibits as you proceed (as opposed to marking them in advance), it may be acceptable to ask the clerk to mark those exhibits. Don't tell the court reporter to read anything back. Ask the judge. Don't tell the bailiff to do anything. Ask the judge.

Don't use "Judge" in open court. Even during arraignments. Save that for chambers and side bar conferences. "Judge" is informal, and is not for courtroom use. Use "Your Honor."

Don't tell witness to step down and e.g., draw on charts; ask the judge if the witness might step down.

Never get personal with the judge.

Never say, 'With all due respect' "because we all know exactly what 'with all due respect' means. Which means, 'judge. You're an idiot, but I can't tell you that to your face, so I'm couching it in terms that won't get me sanctioned.'" Judge Alan Jaroslovsky, U.S Bankr. Ct., as reported in the *Daily Journal*, November 10, 2011, p.2

Know the Law Of Inverse Proximity. Given the range of rules and constraints reaching from the US Supreme Court, to the state supreme court, appellate precedent, statewide rules of court, local rules, to individual judge's personal guidelines and predilections, which are the most important to know and abide by? Let me put it this way: The judge's personal guidelines were written by the judge, and best known by the judge, and likely were generated by some highly unpleasant experience he had in the past, which experience the judge really, really does not wish to have repeated. (I do not of course refer to myself, but other judges.) Next on the hierarchy are the local rules, which your judge may have drafted, and which she very likely voted for. Read the Local Rules. Remember the Local Rules. Follow the Local Rules.

Bad ats.

In high school we had some students we called "bad ats," short for students with 'bad attitudes.' They snuck off into the bushes to smoke cigarettes, had long hair (god forbid), and affected a bored, supercilious expression when caught by the administration. Every now and then we see the same folks, back from the forest I suppose, in court. These are lawyers who must believe there is some advantage in being supercilious and patronizing, who wish it known that they will not kow-tow to authority. Perhaps there are temporary benefits: perhaps some clients or witnesses are impressed. In the long term it is useless, though, and worse: their distain poisons the atmosphere, and ultimately demeans the very job description of a lawyer; the distain untimely redounds to the actor.

There are cartoon versions of what it is to be a *real* lawyer: the fast talking, tough as nails, loud, stiletto- or saber-wielding mercenary who doesn't take crap from nobody. But that really is a cartoon. It is not necessary to do these things to be a 'real' lawyer:

- Make every objection in the book;
- Antagonize the judge, hoping he'll make a mistake because every mistake is a potential grounds for appeal;
- Think the judge is the enemy;
- Manifest contempt for the judge or opposition counsel or the opposing witness whom you think is a lying piece of cheese;
- Constantly insist on making "a record," not because you want the judge to do anything or are truly trying to persuade the judge, but simply to control the situation, or to influence the watching jury, There is no time for long winded, pointless speeches. You can usually "make your record" in writing some other time.

On the other hand, there is no need to be timid or obsequious. The courtroom is your courtroom, and the podium is for you. You are an officer of the court, and you belong there. The judge needs you as much as you need her. Be brave.

Sic Transit Gloria Mundi. Ah, how fast credibility is lost. Most interviews of judges in the local legal newspapers (they have regular columns on this sort of thing) make this point. Lawyers may gossip about judges, but I tell you, judges gossip about lawyers all the time. Indeed, there is really no one else we can talk to about our cases, the issues, and the people involved. So, often the story of one nasty episode with Lawyer X will find its way around the courthouse by the end of the day. As every judge will tell you, it takes years to build up a reputation, but only minutes to kill it.

Parties and defendants know not to chew gum or eat candy in court. Please adhere to the same rules when in court or chambers. It will not suffice to inquire of the judge if he or she "would like some". (True story, as with all the others here.)

Do not speak to the rear door or the floor of the courtroom, especially if you're asking for something (like making a motion). The acoustics in many courtrooms are poor. The judge may have a microphone, but if you do not, ensure you are being heard.

Do not undress for court. Do not be half dressed. Men whose attire--such as pants, tie and collared shirt--suggests the existence, somewhere, of a jacket, should actually be wearing it.

Lawyers are old enough to be drafted, drink beer, and get married: Don't be petulant. Don't whine. Do not make a face, such as one might after unexpectedly eating a lemon, as a response to the court's ruling, or spin on your heels and walk out of the courtroom as a display of what you think about the court's ruling. Another ineffective condescending approach: telling the judge you've been at this "a lot longer than" he has.

There are lines of sight in a courtroom. As you recall from your grade school years, you are a better door than window, and you have not become invisible in your old age. Do not stand directly in front of the bench (the "well") or block opposing counsel's line of sight to the witness. If you stand directly in front of an exhibit the jury might not actually be able to see it.

Do not invoke as authority (1) the fact that 'things have always been this way' or (2) the combined thoughts of your superiors in your office.

Don't sit on the counsel table while conducting your examination or addressing the Court.

You have a professional, ethical obligation to show respect to opposing counsel. Fury, or indignation, are most powerful when virtually imperceptible. Be nice to opposing counsel. No matter what. Assume the judge will read deposition transcripts, and every letter and email you send. Assume a judge on the Court of Appeal (or some lonely clerk looking for a good juicy read) will peruse the trial transcript closely, and joyfully share his spoils with other staff and judges on the panel.

Staff: Be *very* nice to them. Treat them with the respect you would afford a judge (if you were thinking). Staff report everything to the judge, and judges hate it when they hear bad stories.

2. Time

On time means getting to court early. A nine o'clock appearance requires your attendance at 8:55, not later. This includes your witnesses. If it's a jury trial, the jury will very likely learn that the delay was you fault. One way they learn this is when the judge decides to take the bench at the appointed time, note your absence, and wait in dead, uncomfortable, miserable silence for you to show up.

Make sure your witnesses are lined up, waiting outside the courtroom, and assume testimony will go faster than predicted. It is an unfortunate fact that witnesses must wait to be called: The jury does not wait for witnesses to show up. The judge can deem your case closed if you run out of witnesses.

If you are running late, make sure you have the phone number of the court's clerk so that you can call and explain.

Never waste the time of the jury. Wasting the judge's time is bad, but most judges have it within themselves to forgive some transgressions. Wasting the jury's time is of an entirely different quality, because judges are highly protective of the jury: These are people who are the center of the justice system, have given up their personal and professional lives for the parties, are being paid almost nothing, and have very limited ability to speak up for themselves. So to waste their time is very bad.

Many sub-rules follow inexorably:

- Have witness available to fill the time.
- Do not conduct long bench conferences (side bars). Reserve lengthy argument for some other time. Anything over eight seconds is getting long.
- Do not arrive on time only to tell the judge and opposing parties that you need to discuss something—because as far as the jury is concerned, that is another delay.
- While asking questions, be able to reach the specific page of the document (such as depositions or an exhibit) right away.
- If you have legal issue, let the court and parties know the day before, and discuss the matters at the end of the day or before the jury is to arrive the next day.
- Stay in good contact with court during deliberations: Don't drop your cell phone into water and then be out of touch. We need you here *within minutes* if the jury has a question.
- Swap cell phones numbers and email addresses with opposing counsel so that you may alert each other of any delays, such as ill witnesses.

From the point of view of the judge and jury, the fundamental issue is: How long will the trial take? Perhaps your client, too, is interested in minimizing time and cost. Consider these approaches:

- Expedited jury trials. This is one of the best innovations in state practice in years. It is suited to cases with a couple of witnesses on each side. In California, each side has three hours for its case, and the jury is comprised of 8 people (6 are needed for the verdict). The case usually lasts about one day. Lawyers who have participated in the procedure give it rave reviews.
- Pre mark exhibits, and agree with opposing counsel on their admissibility. Generally there are only a few exhibits in a case which truly present difficult issues of admissibility.
- Bench trials. These can save the parties substantial time and money. Consider providing direct testimony via declaration and having witnesses only available for cross examination.
- Use stipulated facts.
- Time limits. Judges are increasingly using time limits—but lawyers too should consider conferring on suitable limits and proposing those to the court. Judges may be using chess clocks to ensure compliance with time limits.
- Issues trial/bifurcated issues. There may be an issue or two ripe for decision which will, once decided, probably lead to a resolution of the case. Bifurcate it out and try that only.

3. Motions

There is no substitute for the ability to actually write English. The best, and so most effective, writing is not overtly legal writing at all, it is simply good writing. It does not have legal jargon, it does not have 'hereinafters,' it does not flog dead horses with string cites. The only way to write well is to read well: real literacy outside the law is usually crucial. This is not the place for an extended essay on legal writing but think of it this way: The lawyer is a translator, maintaining at the same time multiple points of view and enabling communications to and from all those points of view. The lawyer translates esoteric areas of the law for the trial judge (subsection 3-(ii)(a)(A)(xxx) of some obscure statute), grand narratives and legal notions for the lay jury, explains the legal facts of life to clients (such as why the burden of proof requirements will be deadly), prepares witness to understand the ins and outs of cross examination and enlists their side in meeting the technical requirements of the evidence code for admissibility. To do this, the lawyer must be fluent in many dialects: those of the law, life, and the business of his client. This demands real literacy, and it is best served by wide reading-- plays, fiction and nonfiction, poems, whatever may be enjoyable. Every well written book teaches us something about our own legal writing. Think of "outside" reading as billable time.

The Signal to Noise Ratio. In all communications, there is a signal to noise (STN) ratio: A high ratio is good. A low ratio, where the noise interferes with the signal, is bad. The STN ratio in many memoranda is very low.

There are basically two kinds of noise: (1) filler and (2) rubbish.

Filler is all well and fine and unremarkable, but it's not needed. In a recent case involving many scores of motions, the same filler argument was made over and over again- the same cites, the same pages outlining the duty of the court to decide this or that, the same tired recitations of standards. Routine motions (such as demurrers, for summary judgment, perhaps to compel

discovery) in law and motion departments usually do not need to spend page after page on the basic legal rules. Reading motions *in limine* that tell me that I should allow in admissible evidence and that I must weigh the prejudicial effect and probative value of evidence (and so on) is not helpful. (More on motions *in limine* specifically below.) The red flag on filler is this: Did you cut and paste it from another case? Could the text have been written for any case?

Rubbish is worse. Rubbish is misleading, red herring stuff that avoids the issue, misquotes cases (including by selective quoting), and generally does not confront the issue up for decision. It is obvious why this is bad, but the problem often is that rubbish is mixed in with the rest, and it can be tough to see where one leaves off and the other goes on.

Judges spend an enormous amount of time clearing out the debris, looking for the needle in the haystack, bypassing the filler as rapidly as possible, and trying to identify the rubbish and get it off the table. We are only human, and sometimes there just comes a point where the amount of filler and rubbish is too much, and just we put the papers down, rub our eyes, perhaps have a sip of coffee, and move on.

With a low STN ratio, the judge is most unlikely to see your strongest argument, and with all the filler and rubbish taking up your page limits, you won't have the time to address it.

Low STN ratios are symptoms of the Sin of Excess. You may have seen other symptoms during pretrial work. The Sin of Excess is manifest when counsel make every possible (and impossible) claim in a complaint; when they insert every affirmative defense known to law, regardless of whether most of them are applicable or have the slightest factual basis; when discovery demands seeks every paper, and every email, and the responses include every possible objection (recall the Hamilton Burger approach: "incompetent, irrelevant, and immaterial"); when every memo uses up the entirety of the page limits; when every peremptory challenge is used (no matter what the rest of the jury panel looks like). Lawyers get away with the Sin of Excess because much pretrial work occurs outside the sight of a judge, and when the Sin is before the judge (such as in law and motion proceedings), the judge often has no time to address it, spending time instead on trying to discern and decide the merits.

But many lawyers habituated to the Sin of Excess cannot make the transition to trial, and it infects, and undermines, their courtroom tactics. Endless cross examination loses the jury and obscures the key answer; endless objections are a soporific to the judge; introducing a thousand documents ensures no one will read the decisive ones; and so on. In the end it's a matter of judgment, a beatific quality which cannot coexist with the Sin of Excess.

Courtesy copies. If the judge has courtesy copy rules, or requirements on email copies or email communication, find out what those are. In my court, the budget cutbacks have, among many other things, made it virtually impossible for judges (or anyone else) to review up to date paper files. Thus the delivery of courtesy copies is always appreciated, and sometime required. Don't you want to help the judge read your papers? Remember never to provide courtesy copies before the original has been filed and served.

Ex parte orders. If possible, have the other side to sign off on the proposed order or be able to represent that the other does not oppose the motion. Have a line for the date of the order. State the date the hearing is set for.

Do not seek to have unsigned, undated papers "file stamped".

Some attorneys believe that an attorney declaration is a convenient place to insert speculation, opinion, and gap filler for any holes that the evidence does not quite cover. This is actually not correct. A declaration is actually under oath, and should contain only assertions the declarant actually knows, first hand, to be true. Generally, aside from procedural matters, this means that attorney declarations which state the declarant knows the recited facts are actually perjurous. If the declaration recite hearsay, it is generally inadmissible. Don't waste your time, or risk indictment. The baseline starting point is this: attorney declarations are probably inadmissible (again, aside from procedural recitations). "An affidavit based on 'information and belief' is hearsay and must be disregarded." *Star Motor Imports, Inc. v. Superior Court*, 88 Cal.App.3d 201, 204 (1979).

Other futile approaches:

- Arguing that the last motion (or evidentiary ruling) was decided in favor of the other side, now it is your turn.
- Throw it all on the wall and see what sticks.
- Assuming the judge won't read the cases anyway.

Pitching arguments. Sometimes we have broad discretion in a matter, sometimes we do not. These are profoundly different situations. If the court does not have discretion in matter, say so, provide the authority, and you're done. When judges do have discretion, identify the constraints and factors that need to be weighed, but then keep your eye out for the *practical result*. When judges have leave to do it, they generally are looking for a fair, equitable, and practical result, in at least two contexts: practical (A) in the context of the case- what will be best for the lawyers and clients in terms of burden—and (B) in terms of the outside world –what sort of result makes sense were it to be generalized across many similar cases, i.e., the sort of precedent the decision creates.

3A *In Limine* Motions

Here it's helpful to start with the law. A recent case reminds us the true function of motions *in limine*: "A motion in limine is made to exclude evidence before it is offered at trial on the ground that the evidence is either irrelevant or subject to discretionary exclusion as unduly prejudicial. (*Ulloa v. McMillin Real Estate & Mortgage, Inc.* (2007) 149 Cal.App.4th 333, 337–338; *Condon-Johnson & Associates, Inc. v. Sacramento Municipal Utility Dist.* (2007) 149 Cal.App.4th 1384, 1392.)" *Ceja v. Department of Transportation*, __ Cal.App.4th__, 2011 WL 6307881 (No. F058568, C.A. 5th, November 21, 2011). *See generally*, *Kelley v. New West Federal Savings*, 49 Cal.App.4th 659 (1996), *R & B Auto Center Inc. v. Farmers Group Inc*., 140

Cal.App.4th 327, 371 (2006) (Rylaarsdam, Acting P.J., concurring) and *Amtower v. Photon Dynamics, Inc*., 158 Cal.App.4th 1582 (2008).

There are some truly bad *in limine* motions out there. Many of them fit very neatly into the filler and rubbish categories.

1. Loopy thinking.

Here's the loop: the other side doesn't have any evidence on issue X. So the motion asks for the exclusion of any evidence the other side has on issue X. Of course, if the other side *does* have any evidence, then getting this motion granted ensures a very fast trip to the Court of Appeal and right back down again for another trial. If they *don't* have any evidence—well, we'll see, right?

2. Magic: Turning 75 days into 24 hours.

Summary judgment requires 75 days' notice. Too long? No problem. Put your thoughts into a motion *in limine*: The other side doesn't have the evidence (so you say), so get the judge to strike the claim (or defense). Boom, you win. But, as Richard Nixon said, "that would be wrong." *See* cases cited above.

3. Always do the right thing. *Always.*

This motion *in limine* wants me to rule correctly on all evidentiary issues. I hope I will. Without cluing me into the specific evidence the author has in mind (at argument, it often turns out the author has nothing in mind)(oops, did I phrase that correctly?), the motion seeks the exclusion of all 'irrelevant' or (better) 'inadmissible' evidence. Or it might ask that all hearsay, or unauthenticated documents, be excluded. But I ask myself, how have I made the world a better place by issuing such an august ruling?

4. No Surprises.

No one likes trial by ambush (except when we're the ambusher). Discovery was meant to remove the tingle of fear, shock and horror when the other side announces a new witness or document. Thus this motion seeks exclusion of anything not disclosed in discovery. Often the request is as vague as it sounds: no specific item is mentioned. (Some lawyers resent being called on this one: How can I possibly tell you what to exclude, they will say, when the whole point is that I don't know what it is?) But some parties do discovery and some do not, and some do it poorly. I can't budge until I see actual discovery abuse-- and that usually requires the identification of the evidence sought to be suppressed. Among other things, such as a showing that the discovery was sought, was promised (or a court ordered its production), and that the offending party had it at the time of the response.

4A. Surprises: Variation on a Theme.

A variant is a demand that no witness be permitted to testify differently from something she said in deposition; or the motion seeks a ruling that interrogatory responses are binding, and no testimony to the contrary will be permitted. Deep confusion reigns here. While responses to requests for admission are usually binding, other discovery responses are not. Here's the thing: Some people lie. Or they make mistakes. Or forget. There's even an instruction on this (CACI 107). Yes, experts are trickier (I don't mean that negatively): depending on how carefully deposition questions were asked, experts might be barred from expanding on their opinions, but otherwise the principle remains the same: people, God bless 'em, *can* impeach themselves.

5. No Surprises *At All.*

The "no ambush motion" is often coupled with this one, or the point is raised at argument: Well, judge, if you won't bar evidence because it wasn't previously disclosed, at least compel the other side to make an offer of proof. On everything. Now, I could routinely grant such motions: We'd have a little pre-trial trial (well, one about as long as the trial itself) and then try the case. Fun. But that would have us abandon the very last delicious *frisson* of anxiety that every trial lawyer lives for. Not everything is previewed.

6. Mr. Obvious.

There is a group of motions which asks for the obvious, and for the life of me I can't figure out the motivation. Perhaps the moving party likes to increase his score—aha! *I won seven [unopposed] motions!* Or the level of trust between the sides has plummeted to a fascinating new low. (Judge, we want you to order opposing counsel to wear clothes.) I call these "of course" motions, and usually none is needed. They ask for punitive damages to be bifurcated from the liability portion of the trial; to exclude witnesses until they have testified; to bar mention of insurance; to bar the calling of opposing counsel as a witness (when there's no reason to think they would); to exclude settlement discussions as evidence of liability. In the same category is the motion that seeks a bar on publishing items to the jury before they have been admitted or without the prior consent of the other side or the court.

7. Good Precedent & Bad Precedent

Good precedent enables inductive reasoning from past authorities to suggest the answer in a new case. Bad precedent is cutting and pasting a new caption into the set of *in limine* motions used in your last three trials. Extremely bad precedent is doing a lousy job in the cut and paste and leaving in the name of the old client.

These are more generally useless motions *in limine*:

- Bar evidence relating to dismissed claims (without identifying any);
- Bar pleas to sympathy of jury;
- Offer of proof as to other side's impeachment materials (!);

- Bar suggestions that the jury may ignore the law;
- If "necessary" use 402 hearing (i.e. outside the presence of the jury), for unspecified purposes;
- Disclose witnesses in advance;
- Exclude evidence of settlement negotiations;
- Exclude evidence of liability insurance;
- Exclude experts not previously disclosed;
- Exclude golden rule argument;
- In criminal cases,
    - Exclude post arrest statements (where there aren't any);
    - Exclude opinions on guilt or innocence;
    - Provide all *Brady* material – the prosecution is already under the Constitutional obligation to provide this;
    - Provide all "exculpatory evidence"—this is same thing as *Brady* material, but I suppose adding in as another motion makes for a more impressive package;
    - Provide criminal records of the State's witnesses—again, this is already required under *Brady*.

The point is not that the ruling sought in many of those motions is legal error; but only that the issues are understood, and do not require a court order. At most, these usually only need a brief consultation among lawyers to ensure there are no problems.

Motions to exclude certain expert testimony may or may not be filler. As with most of the motions alluded to above it depends on whether there is really an issue, some *identifiable evidence actually at stake*. A motion to exclude all testimony not previously provided, made without further explanation, is pointless. But if the movant knows an expert is actually expected to provide certain testimony that the expert never alluded to in his deposition, and/or as to which there was no notice, the motion becomes that rare, gleaming thing: the genuine article, presenting an *in limine* matter that deserves resolution.

Finally, a plea to have a peek at the local rules. Just a little peek. Here in San Francisco, *in limine* motions are due 5 to 10 days before trial. LRSF 6.1. I know, I know. The joke around here is that we need a rule to get lawyers to look at the rules. But complying with the rules shows you are serious, and gives the parties time to meet and confer—and to agree; so reducing the girth of those monstrous three-ring binders, fattened with motions.

4. Jury Selection

There are some lawyers who honestly use voir dire to ferret out those who might be biased against their cause. All lawyers spend at least some time on that, but many lawyers have ulterior motives, and spend considerable time seeking to condition the panel, set up arguments they will use in opening and closing, and so on.

A little background might be helpful. Voir dire by lawyers is a creature of state statute, not a matter of constitutional right. In federal court, lawyers often do not engage in much voir dire: it

is primary a matter for the judge. *E.g., People v. Bittaker,* 48 Cal.3d 1046, 1084 & n.21 (1989). But even for lawyers, the primary permissible reason for questions is to be able to raise cause challenges. True, they need information that helps them with preemptory challenges as well, but that doesn't add much to the analysis. What is plainly objectionable are questions designed to educate the jurors about the case, set up the juror to commit himself to a position which can then be cited later in the trial, otherwise precondition the panel, or instruct them on the law (or suggest what the controlling law is). Most judges use this rule of thumb: If the question is designed to impart information, it is objectionable; if it solicits information, it may be permissible.

The more it looks like you're simply trying to ingratiate yourself with the panel and are simply using the opportunity to get a little face time, the more the judge is likely to sustain objections to your questions, interpose her own objections, and hold you strictly to any time allocations. And the contrary is true: If it looks like you're honestly trying to see if someone has a bias, the judge is likely to afford additional time and overrule objections.

There are some routine questions which are not useful: "Maybe this isn't the best case for you?" This is addressed to someone the lawyer hopes to have bumped for cause. But no one cares what the answer is to this question, because it doesn't matter if this is the "best" case for the panelist. Bluntly asking a panelist "so you can't be fair, right?" is not likely to be effective unless you know the person is hunting for an excuse to leave. Pressing, leading questions like this often backfire, too, because people (generally) like to think of themselves as fair. Highly aggressive leading questions (if not caught by the judge) are very risky, sometimes leading to smoldering resentment and occasionally a rip-snorting counter attack from the panelist.

Two more tips. Consider discussing with your judge a pre-arranged signal to be employed when it's obvious that you have a nut on the jury panel. Every now and then there is someone who is so vitriolic, unstable, angry, or bent on getting out of service that he or she will literally say anything. A very brief side bar can also save time in this circumstance. Finally, and perhaps most obviously, know what questions the judge plans to ask. Have a look at the Standards of Judicial Administration, 3.25(c), which most judges use. Don't be shy in suggesting other useful questions, peculiar to your case, for the judge to use, and thereby perhaps save yourself some time. But I must say, it is depressing to get from counsel a re-typed list of the questions already set forth in the Standards of Judicial Administration…. alas, one more piece of paper destined to end its inglorious, useless life in the recycling bin.

5. Jury Verdict Forms

In the software industry the phrase 'spaghetti code' is used to describe code (i.e. a series of instructions) which is impossible to follow: like mass of cooked spaghetti, it branches off in multiple undeterminable ways: one is unable to determine how the branches return to the main stream of instructions (or if they do), or how all the various possible data inputs and results are accounted for.

The opposite, highly structured code, is easy to understand, has comments explaining each step, and plainly notes each input and every result and the links between the two. All software is (with more or less success) *debugged* before release, to ensure that what may appear to be logically structured instructions are so in fact.

So should we proceed with special verdict forms. Avoid spaghetti code. Debug.

The first set of special verdict forms proposed by lawyers are almost always spaghetti code, at least in cases with anything more than a few questions. The problem is that appellate courts seem to have no compunction in reversing when they can't understand the verdict, or there are internal inconsistencies. They are really merciless in this way. At trial, crises are precipitated when the parties submit lengthy special verdict forms just before closing argument, and there is little or no time to sort the mess.

So, parties should meet and confer on the form, then give it to a non-lawyer to determine whether the lay person can, following the instructions, possibly mess it up. This is debugging: tell the layperson to *try* to come up with answers which, when coupled with the instructions on the form, lead to inconsistent numbers or results, cause the form not to be completed properly, and the like. Assume the jury will, if it can, fill out the form perversely: If there are two causes of action based on fraud, assume they will find differently on each one. If they are asked to compute damages for two claims which are based on the same evidence, assume they will generate different numbers. If they are asked for damages on various claims and then somewhere else there is a line for total damages, do not assume the total will equal the sum of the other lines. If there is a scenario under which damages claims overlap, assume the jury will make the findings which lead to the greatest difficulty in understanding what damages were awarded for. Think: if one or more claims are reversed on appeal, will the verdict form be sufficiently specific and clear that we will be able to tell which damages survive? (That's good.) Or will we have to retry the case? (That is bad.)

Another trap. If you take my advice in having a special verdict form substantially in advance, you may need to change it as claims are dropped (or added) at trial, or for other reasons. The very carefully tweaked instructions ("If you answered "YES' to Question 89, then answer Question 92. If you answered "NO" to Question 89 then answer Question 90") will have to be very, very carefully revisited to ensure the instructions still lead the jury to the correct next steps.

6. Juries

Bridging the Gulf. There are so many audiences at trial. The judge, the jury, opposing counsel, witnesses, the client. The Court of Appeal, which will read the stone cold record. Perhaps one's malpractice carrier. The easiest thing is to slip back into the legal persona used in the pre-trial proceedings, which as I suggested above is likely to lead to the Sin of Excess.

But there's a further point in this context: In pre-trial proceedings, the lawyer has essentially been engaged in a highly literate pursuit (successfully or not): she has been writing in the peculiar way lawyers and judges do, invoking the artificial rules of the law to win motions, gain

or refuse discovery, all with an emphasis on careful parsing and at least an effort towards literate, logical reasoning.

The jury audience is not part of that artificial legal world. Every lawyer who has ever tried to explain the legal facts of life to a headstrong client knows the frustration of walking through the seemingly arbitrary details and procedures, knows that legal results do not mesh with a client's sense of equity and fairness—in short, knows the sometime great gulf between the legal world and peoples' daily concerns. And despite the best efforts of judges as they instruct, the roadmap provided by well-crafted special verdict forms, and the sometime methodical progress of a trial, juries do not always take a logical or literate approach to the case. Think of the jury as, sometimes, *post*-literate. Depending on age and education (and, doubtless, many other factors), some jurors reason associatively, rather than logically; they think in and rely on images and graphics, they are unable to attend to long documents, and will not follow argument with a long series of predicates. (By associative reasoning I mean the sort of processing that a search engine, such as Google, might undertake: the agglutination of a variety of facts that appear in some way to be related, although not all necessarily related in the same sort of way. The result can be an undifferentiated mass of evidence which weighs evidence in highly unpredictable ways.)

As a consequence, techniques that worked perfectly well before a judge at summary judgment or other hearings may fail with a jury. It seems obvious once said, but I have seen many lawyers just rely on a mass of dry documents, spend time reading out difficult portions of contracts, and so on, oblivious to the jury's ability to imbibe the information.

The other difficult transition is to let go the Sin of Excess to concentrate on the One (or perhaps Few) Important Things. As I have implied, judges are familiar with the Sin, and are used to parting wheat from the chaff; but jurors are not. Beginning with a confusion about the legal system as a whole, unfamiliar with the rules, and knowing nothing about the case, they will be lost very quickly if the lawyer does not immediately generate a very high STN ratio. The lawyer who has enjoyed making every claim, defense, and objection must concentrate at trial on the One Ring. The One Story. The Key Document. Without this, focus is lost, and the verdict is as likely to be the result of random factors as your efforts.

There is another transition lawyers need to make from pretrial to trial, and that is to set aside the overt manifestation of pretrial hostilities. You may have survived three years of brutal antagonism, monstrous depositions set on your child's birthday, demands for TROs while you were in the hospital, threats delivered to your veranda chair during a Tahiti vacation, and scores of absurd discovery motions accusing you of midnight document shredding parties. Put it aside. The jury reads you like a book. Carrying over the antagonism of the pretrial phase, or any suggestion of a self-righteousness, condescending manner—will kill you in front of the jury. (Judges won't like it either.)

Talking in front of jurors. Never talk to anyone while the jury is still around at e.g. breaks. You should not speak to co-counsel, clients, or witnesses. Jurors can hear from remarkable distances, and their ear are magically tuned to your *sotto voce* voice. They can read your lips from a hundred yards. Seriously, jurors will do anything to overhear gossip and get more information about the case, lingering by the water cooler, pretending to go through their purses, re-arranging

their papers, and engaging the clerk in a discussion about parking. Don't be fooled. They are actually listening to everything you, your clients, and the witnesses are whispering. Do not review exhibits which are yet to be admitted, have your laptop open, or go over videos or PowerPoint's you intend to use. The jurors will see it, and the ensuing conflagration may result in a mistrial. And if it does, you, conceivably, might be on the hook for the expenses of the other side incurred in the original trial.

While on the subject of communication, make no expression while the other side argues. Sometimes the only reason the jury sits up and pays attention is when you start to shake and tremble, or look imploringly and disbelievingly at the judge.

Treating juries well

It is remarkable how often lawyers forget that everything they do ultimately is designed to influence the jury. Frequently, lawyers ask questions about document which the jury cannot see; indeed, in many cases jurors have not actually seen the key document until the evidence arrived in the jury room during deliberations. One contrary case stands out in my mind, in which every sentence of every document on which witnesses were questioned was flashed up in large highly readable font on a screen, allowing the jurors an easy way to follow. The case resulted in a very large verdict for that lawyer. But in other cases, jurors have no idea what the testimony means, because they simply cannot follow without the text in front of them. If you do not use a screen, consider copies for the jurors, or a blow up of the key text.

For similar reasons, jurors always benefit from <u>*organizing*</u> items. These might be timelines, charts, org charts, technical terms and definitions, and other graphical exhibits. Jurors notebooks are recommended by a host of trial guides, but I must confess I have never seen one used in my court (other than the usual blank notebook for notes that we give out at every trial). A good notebook might have tabs for notes on different defendants, photos of witnesses with their names, resumes of experts, and room for other exhibits or portions of exhibits as they are admitted.

Stay out of the jurors' personal space. Do not get close to the bar or other line used to mark the jury box. Aside from *voir dire* and during argument, don't talk to them. Do not ask them how they are, if they are comfortable, whether they can see an exhibit, or other transparent excuse to ingratiate yourself. Gratuitous communication with the jury is bad form, violates the law, and they usually know exactly what you're trying to do.

Lookin' good. Talk to local counsel about this. Cowboy boots and leather jackets are fine in some places, and not in others. Think about it: how much gold showing is really right? But 'looking good' has other aspects: a carefully arranged counsel table sends a very different message than a table with scattered overlapping papers. Make neat piles. Counsel who finds what he or she is looking for right away not only saves time, but is favorably contrasted with the lawyer who is constantly fumbling, apologizing for not being able to locate something, and otherwise apparently out of control. When I handled criminal assignments, I routinely came across lawyers at arraignments and motions who, frankly, looked like hell; I suppose judges

might be expected to stomach that, but these same lawyers would then walk into a jury trial the same state of disarray. Associative reasoning (described above) generates this inference: slobby lawyer means slobby case.

Words & terminology. The jury has no idea of what you're talking about. If there are more than two parties – there's trouble. If there are a variety of key people or companies involved in a case, the jury will be lost without help. Any use of acronyms will spell trouble—and explaining them once is not enough. All legal terminology is problematic—and that covers most of the words lawyers like to use in court, such as plaintiff, defendant, pro per, submitted, filed, lodged, admissible, sustained, overruled, cross-examination (well, they might know that one), opening, rebuttal, caption, pleading, interrogatory, deposition, voir dire, statute of limitations, authenticate, cause of action, estoppel, verify, privilege, and on and on. Some preliminary jury instructions address a few of these words; nothing prevents counsel from suggesting other introductory instructions, including substantive instructions such as on the key types of claims—the definition of negligence, fraud, the elements for a contract claim, and so on. The use of good graphics, and notebook reference materials discussed above, will help too. Above all, speak plain English. Forswear the ad damnum erstwhile ex parte hereinafters.

Don't read to the Jury. Sometimes depositions have to be read to the jury, and there's no getting around it. These are miserable, miserable times, and make judges and juries grumpy. If you try to spice it up, the judge sustains objections; if you unobjectionably drone on, the jury starts thinking about lunch. But aside from these depositions, there's usually no reason to read to the jury. No judge likes pages of documents read into the record—just admit the document, highlight the key sections, and project those graphically or hand the damn thing out. Do *not* do as I did in my first trial, a federal prosecutor a few months out of law school on rather wobbly legs, who read the opening statement to the jury almost word for word from note cards. The judge (a former United States Attorney who, I see now, had infinite pity on me), stopped the trial, took me to the private hall outside his chambers, and told me never, ever, ever, to read an opening or closing to the jury again. I recall nothing else about the case. Yet here I am, decades later, seeing young lawyers reading their openings and closing to the jury. They think that using PowerPoint makes it all alright; it's not really *reading*. Tip (and more on this later): Using PowerPoint makes it *worse.*

7. Witnesses

Interpreters. My Cantonese is lousy (I can ask for change on a bus, and that's about it) but I've heard enough to remove an interpreter from a case. It was obvious she was not actually translating, but providing context and perhaps some guidance as well. ("Yes" is one word in Cantonese, not ten sentences.). Being very helpful, I am sure. Be sure your interpreters understand the legal context and the demands of the job, that they are experienced in the question and answer format, and know how to interrupt a witness who going on too long with a response. Some interpreters take notes as the witness speaks, but after a while during a long response will evade even this protection, essentially losing evidence.

Have your interpreters be on time: we can't start without them.

Here's an exercise we're taught at new judges' orientation to appreciate the burden on interpreters: have a friend speak, and just repeat what the friend is saying as she is talking, in the same language (English in fine). Don't try to translate: just repeat simultaneously as she speaks. See if you can get past about one minute. Try this a few times and you will thenceforth keep your questions short and instruct your witness to do so as well.

Court reporters and witnesses. A trial is not a dinner party. Ensure you and your witnesses do not talk over or interrupt each other. A well trained reporter will, given a choice among talking down what the witness, judge and lawyer are saying, choose the judge's words. Not yours. Don't try to compete with the judge. If you're interested in an accurate record, work with your witnesses to ensure a smooth question and answer format, which usually means taking a beat between question and answer. Enunciate clearly, speak slowly. Tell your witness to do the same, especially if you have someone who is excitable. If you turn away from the court reporter, speak **much more loudly**. If you or a witness has the common nervous tick of making meaningless encouraging noises while the other person is speaking ("hmm…yes, yes, un huh, uh huh"), consciously stop it.

Once again: Don't talk so fast.

Again. Slow. Down. Please.

Ensure your witnesses know about things not to mention, e.g., rulings from *in limine* motions. Help them out, too, with the format of your question: "Now, without telling me what Ms. Finkelstein may have said, did you talk to her on Monday?"

7A. Questions and Answers

Occasionally a lawyer tries to control answer by interrupting: perhaps by saying something or using body language such as a raised hand. Please don't. Ask help from the judge if you want to get the witness to just answer questions directly. Your questions, too, might be part of the problem, in inviting a meandering, narrative response. ("And then what happened?" "Why is that?") Some lawyers take it upon themselves to tell the witness that the question calls for a yes or no answer; different judges have very different reactions to this, and it may depend on the extent to which the witnesses appears to have been evasive. Some judges really do prefer that the lawyers ask the court for assistance and not presume to instruct the witness. Certainly, telling witness to answer "yes or no" in an angry and impatient way probably won't work: The judge may contradict you and tell the witness he can explain his answer; and your tone, rather than provide a firm, no nonsense appearance may backfire and make you look like an angry, impatient, impotent wasp.

Juries may ask questions in many courtrooms in California. Figure this out with your judge in advance. The judge will usually confer at sidebar with the lawyers on written questions submitted by the jury, and will generally ask the ones that appear unobjectionable. Some judges

simply show the questions to the lawyers and let the lawyers ask those questions which they desire. If the judge asks the questions, she will almost always then allow the parties reasonable (*ahem*: this means brief) follow up questions.

Do not call your client (or any witness) by the first name unless the person is under about 15 yrs. old. Many lawyers, especially in criminal cases, do this with their clients in a pointless attempt to ingratiate the client with the jury "Bobby," she asks her 45 year old client, "tell the jury how you and your mom used to make pecan pies." This is irritating. Some lawyers refer to co-counsel, or opposing counsel, by their first names. This is simply not formal enough for a courtroom. Save it for chambers where you can spread a nice warm glow of collegiality, and show the judge that the lawyers are all really best friends despite appearances to the contrary, such as blood on the courtroom floor.

Bad questions.

Here is a miscellany of bad questions. While most of these are ultimately harmless, they confuse the issues and are a waste of time.

"Is it possible that…." Unless the matter is a logical impossibility (is it possible that 2+2=8?) or a factual impossibility (is it possible you saw a unicorn?) the answer to this question is *always* "yes." Anything is possible. Accordingly the question is pointless. There is an exception here, which is that the question posed to *experts* often may be reasonable, although it continues to be potentially misleading. With experts, the question is often shorthand for a switch in assumed facts, but in an entirely undefined way. So, for example, if an expert testifies that, with a given set of circumstances, a roof would never catch fire, or a hip joint would not break, or an air bag would not deploy, etc., cross examination might ask, whether it was "possible" that the event might occur. A yes or no answer, alone, will usually not be helpful, so the newly assumed facts will have to be fleshed out at some point.

"Didn't you testify that…". This is often a squabble about wording. I assume the jury has been paying attention, and testimony on what a witness has testified about poses the risk of a dangerous infinite regress. Find another way to impeach. The issue is very different, of course, when the former testimony is from a different proceeding, *not* before this jury, and counsel is setting up impeachment with inconsistent past testimony.

Any question longer than 15 words.

"You heard witness X say… (or, "Assume witness X said….)… are you calling X a liar?" This is either rhetorical flourish, argument to the jury, calls for speculation; or all of the above.

"Would you be surprised to know….." or "Would it surprise you to learn that …" Nobody cares if the witness is surprizable or not. The question obviously is designed to get a fact in front of the jury whose source is the lawyer, not the witness.

"Is it fair to say that…" What would it mean if the answer were yes? Or no? Fair to whom, exactly? It might be "fair" to say that the car ran the red light, but not true. The question is just a cheap way to get the witness to agree with the phraseology of the examiner's question when the questioner is afraid that if he straightforwardly asked the corresponding leading question ("The car ran the red light, didn't it?"), the witness would refuse to go along.

Some lawyers on cross examination must always ask leading questions, no matter what the cost in coherence. Here's my favorite: The multiple double negative.

"You did not tell the officer you hadn't been drinking?"

"No."

No *what*?

While we're on the subject of cross examination, common wisdom bears repeating: good cross is a stiletto. The best lawyers know exactly what they want. They ask a few questions, and sit down. The worst lawyers treat cross as a deposition, exploring this avenue and then the next, hoping, it seems, to find a little nugget which might be useful. This is not only a waste of time, but three classic dangers loom: (i) Loss of focus (no one may notice the nugget, lost as it is in a miasma of tedium), (ii) an answer you don't want, and (iii) opening up the scope of re-direct to a thousand new subjects. This deposition style cross examination often steps laboriously through the entirety of direct, too, which is no favor to anyone other than your opposing counsel, who agrees with you those were pretty good subjects to have the jury learn about again.

Tedious, pointless cross examination may sometimes be a function of the fact that the lawyer has been unable to leave behind the Sin of Excess, indulged in during pretrial proceedings. Lawyers spend a lot more time in depositions and wide open discovery than they do in trial, and in effect become trained to the approach of meandering down every country trail and peripheral path. Concomitantly, one sees much less of this in criminal cases, where there is little pretrial discovery and generally a sharper focus on the merits at trial.

8. Evidence

We have all experienced that sudden sinking feeling when we know something is wrong, but we just can't put our finger on it. It's at the tip of the tongue. So at trial as evidence comes in that you know is objectionable—but you can't quite say why. And you have literally a second or so to blurt something out. I suppose that's how Hamilton Burger felt as Perry Mason did his magic in the courtroom, and why Burger always said the same thing, with that classic look of outrage on his face (i.e., judge, I really mean it this time): "incompetent, irrelevant, and immaterial." Multiple bases for objection are sometimes right, but not often, and they make it more difficult for the judge–who too is moving at light speed now—to evaluate the real evidentiary problem. In one trial, the lawyer objected to a question on eight different bases. I paused, and asked her to pick two.

The underlying problem here is the lack of familiarity with the evidence code; many lawyers just are no good at rapidly analyzing the issue posed by a question. They confuse issues of reliability with hearsay (which in state court, unlike federal court, are usually unrelated concepts), don't

know how to have documents admitted, and tend to make objections every time evidence is presented they don't like, perhaps in the futile hope that every now and then the judge will feel sorry (or just make a mistake) and sustain a meritless objection. Many times I have seen counsel object that a question is leading -- when the question is addressed to their client on cross-examination, and on hearsay grounds when the statement is obviously that of the party opponent.

There is no substitute for a very good grounding in the evidence code. The judge is under no obligation to rule on objections you didn't make, and it is highly unlikely you'll be able to appeal on the basis of inadmissible evidence if you didn't make the right objection at the time.

Experts. The classic problem with experts at trial is the extent to which their testimony is admissible, given the earlier expert disclosures and depositions. Specifically, the issue is whether their trial testimony is congruent with (1) their actual expertise (2) what you need for your case, (3) the expert disclosure, and (4) what they testified to in deposition. Any mis-match among these categories, and the expert may not be allowed to testify. If the witness is to testify on a pilot's standard of care during night landings in bad weather, she needs the expertise on the subject, it has to be helpful to your case, her expected testimony should have been outlined in the formal disclosure, and she should have expressed her opinion at deposition. Thus, both the proponent and the opposing party must be able to fluently and rapidly move among all these categories to demonstrate congruity or its lack as objections are made during trial.

What doesn't work is the unadorned objection that the testimony is beyond the scope of the deposition. What do you expect the judge to do? Read the whole deposition to see if the issue came up? Lawyers need a fast way to map out the deposition for the court and demonstrate that the opinion was never provided.

But remember the *Magic Question.* The fact that an opinion was never provided in deposition may simply be because the right question was never asked. The judge must see that last Magic Question, which is in effect whether the expert plans on giving any opinions at trial not expressed in the deposition.

Depositions. At least when used as evidence in a case-in-chief, reading deposition is a deeply unfortunate use of time at trial. But it's usually unavoidable. There are a few things that make the process less painful, and less susceptible to interruption by the other side or the judge. Advance preparation is needed to get designations, counter designations, counter-counter-designations (etc.) in front of the judge in time to allow the judge to rule before the time of the depositions. Usually, the judge won't have time during the trial to do this (he's presumably attentively listening to you and your witnesses), so work in advance of jury selection is usually needed. If a video deposition is to be used, the preparation must be sufficiently far in advance to allow the steps just outlined plus allowing time to edit the video.

To rule on objections, the judge usually needs the context, and, when the counter-designation is based on the principle of completeness, the judge definitely needs to understand the context. Thus, a good way to get the objections before the court is to use a single paper version of the transcript, with designation and objection in different colors for different parties. Objections can

noted in the margin or if absolutely necessary just marked on the transcript and explained (please: very briefly!) in a separate document.

Whether for impeachment or not, depositions should be read *in haec verba* omitting objections and colloquy (unless the colloquy is needed to understand the answer). *In haec verba* really does mean *just* those words in the transcript. It does not mean explanatory or parenthetical comments by the reader. To have a good record, say "Question" and "Answer" to introduce those components of the deposition.

Especially with video-taped depositions, have copies of a transcript (with only the words to be uttered on the video) available for the jury to follow along.

As you are about to call a witness with whom you expect to use a deposition, tell the clerk. The clerk can retrieve the transcripts from what may be a five foot tall stack and ensure the judge has them ready to go.

Documents and exhibits

> "…no jury …is going to seriously examine more than 75-100 documents" Judge J. Anderson, "A Judge's Lament Over The Demise of the Civil Jury Trial," 26 *Defense Comment* 12, 17 (Fall 2011).

My goodness we do love our paper. Think of all that time and money spent getting it and reviewing it and thinking about it. It would be a crying shame to waste it. Actually, it would be a crying shame to use it, because you'll lose the jury. In the typical 5-8 day trial, I suggest 25 key documents is about right; anything else is lost in the miasma. I am exaggerating for emphasis; but not much. Consider summaries and compilations. It is common to see cases in which the parties have agreed to the admissibility of large quantities of documents, and then never mentioned most of them again including in closing argument. What were they thinking? Aside from some papers essential to meet some element of the claim (e.g., the lease in an unlawful detainer), do what you can to keep the volume down, including by having an early exchange with the other side and deleting duplicate exhibits. If you don't like using exhibits marked as that of the other side, devise a single neutral numbering system.

In fact consider adopting a neutral numbering system from the inception of the litigation. Each document would have its own number from first production, through deposition, to trial. It is mighty irritating to have to interrupt examination to make it clear that exhibit 34 to the Watson declaration, while it is also exhibit B to the Holmes deposition, is actually exhibit 14 in this trial.

If you don't make these efforts to cull your exhibits the court may do it for you, with perhaps less sensitivity than you might wish. I still recall a securities case from long ago in Santa Clara. The judge asked at pretrial conference how many exhibits one of the parties had. "250,000, your honor." The judge paused, and said, "No, you don't."

Some folks have a very tough time getting documents admitted. They don't know the rules on authenticity, and can't keep straight the elements for business records. My favorite (wrong) ground for admission was this argument: "it's from the Internet." In fairness, there *is* considerable confusion on the authentication of web pages and other web based content; so don't leave it to the moment of requested admission at trial to consider how you will have this material in evidence. Walk yourself through the foundation in the privacy of your office.

You are out of order. There are a few basic steps in using documents. These are painfully obvious, but it is far more painful when the steps are not observed. In the heat of battle (perhaps a better metaphor: the fog of war), lawyers sometimes take out an exhibit and show it to the jury; then turn to the witness and ask, "is this the photograph of the intersection where the accident took place?" Later, if I have not arrested this misbegotten sequence, they deign to ask me to have the item admitted (or they forget). Here, of course, are the steps:

1. Mark the exhibit, if it has not pre-marked. *Even if it has been pre-marked,* provide for the record and the clerk (1) the number and (2) a very brief description of the item.
2. Provide copies to all parties and the court
3. Show the exhibit to the witness, but do not let the jury see it
4. Lay the foundation for admissibility if not done before
5. Ask that the exhibit be admitted
6. Then if you wish show it to the jury, or publish it, or distribute copies to the jury (first asking permissions from the court).

There certainly are times where no one minds if an exhibit is shown to the jury before formal admission, but clear the procedure with opposing counsel or the court first.

Many new lawyers ask me at the end of trial, just before closing, and after they have rested, which exhibits were admitted. (*Long pause here*.) Really? You didn't track that? There have been a few times when I have very, very gently told them that they didn't actually ask to have any exhibits admitted. Ah. (*Pause*.) Well. But far be it from me to claim moral superiority here. Failing to admit any documents is exactly what I did in my first hearing out of law school. The judge was without mercy, and I lost the hearing as a result of my mistake. Never again did I have a hearing without a paper table where I noted exhibits marked and admitted. But I don't see most lawyers using any such aid. Tip: use one.

A note on copies. You must have copies for the other parties and the judge. And no, they cannot be different versions than the original. "Pretty much the same" is not a copy. A black and white image of a color original is not good enough. The one key caveat is this: the original exhibit must be distinguished as such from the copies; this is an issue when the original, with colored exhibit sticker in place, is photocopied to make the copies. Then the original and copies really may be identical, and confusion erupts, including the possibility that a party's copy, with counsel's notes on page 2, ends up in the jury deliberation room. Copies should be marked "copy" or some such to avoid the embarrassing problem. The witness *never* looks at a copy; but only testifies from the original exhibit.

An old friend of mine keeps his copies in specially colored binder (e.g. red), and hands out copies in a different color binder (black). All are identically tabbed and indexed.

Keep all exhibits in one place once admitted or used. Usually the courtroom has a basket or other location for admitted and/or mentioned (i.e. "to be admitted" or identified) exhibits. Use it. Otherwise they will disappear, other parties will not know where the items are, and witness will take them home. It happened.

9. Equipment and Technology

Ain't technology grand. Courtroom technology is the subject of at least one seminar in every bar conference, always good for a few questions every time a judge is interviewed, and a routine source of friction at trial.

Here's the basic rule: Technology is great if lawyers know what they're doing; and a distraction and waste of time if they don't. *They often don't.* In a criminal case, a lawyer took 20 minutes (with a recess thrown in for good measure) to get an audio CD to play in the CD player. It seemed such a simple thing that I and the lawyer thought the damn thing would fire up any second now; so we all waited. And waited. Nothing was broken. It was just … one of those things. The jury sat there, face planted in hands. Two jurors in their post-trial questionnaire mentioned only the CD player problem; everything else had faded away.

What irony. Lawyers use technology based on computer data in order to address among other things the problems of the post-literate jury, folks with low attention span to whom a letter of 250 words is best understood as ten 140-character tweets. But technology failures in court slow everything down, break concentration and lose the audience.

What is 'technology' in this context? Anything but your voice and original documents. Once we venture past those elementals, our control over the universe becomes suspect, and that's the point: Murphy's law really rules here. Technology includes the use of an Elmo, video depositions, animations and simulations, computer display of documents, annotations with light pens on video displayed documents. It includes pencils (they will break), pens (they will run dry), extension cords (you will forget to bring it), audio recordings (the speakers will not work), video depositions (outside light will wash out the image), and blown up exhibits on foam core boards (you will forget the easel and will try to hold up the 2' x 4' boards as you are asking questions and looking for your notes. This will not work.). Judges Alsup and Breyer of the North District of California have this in their trial guidelines; "For electronic equipment, either know how to fix it or have a technician handy. For overhead projectors, have a spare bulb." You just *know* there was a trial where a burned out bulb caused an irritating delay. And we have all had trials in which a lawyer has stared dumbly at some machine and muttered very softly (but we all heard), "I don't know how to run this ***** thing."

So, a few tips:

- Bring in *everything* you need- thumbtacks, projector, screen, easels, pens, marker pens, extension cables, white-out. Assume the courtroom is bare. And in this time of budget cutbacks and reductions in court staff, when judges sometimes buy their own sticky notes and paper pads, the bare courtroom is really not a metaphor. Don't even assume the courtroom has a table for your video projector. You're lucky we have chairs.
- Set aside time to meet with the courtroom clerk to discuss setting up equipment. Consult with the clerk before you start moving furniture or set up equipment. The clerk knows about lines of sight, fire exits, and other requirements.
- Practice the presentation with *exactly* the same equipment and data sources, with the *exactly* the same personnel, as you expect to use at trial. You must practice with *exactly* the same software you plan on using at trial- versions may not behave the same way (this is true, by the way, of PowerPoint), or may be incompatible with files made by another version.
- Your office is not the courtroom, The fact that you can hear those tinny laptop speakers doesn't mean folks in a large courtroom with atrocious acoustics will. Internet connectivity in your office doesn't mean you will have it in the courtroom. Don't count on the lights being turned down in the courtroom in order to see your slide show.
- Because Mr. Murphy will do what he can to sabotage high technology, bring low tech backups, such as paper and foam core versions of items to be projected. Be prepared give your closing, scheduled as a multimedia shock and awe *son et lumiere* presentation on five screens, with only paper notes.
- High tech has an embracing, insidious power: it can distract you and the jury, and over reliance on it will reduce your flexibility to adapt to swiftly changing circumstances. It is simpler to adapt to court ruling on depositions with paper versions than with video versions; it is easier to modify one's opening when relying on notes than with a PowerPoint; it is simpler to redact a paper exhibit than the PDF form to be projected on a screen.
- Talk to the other lawyers about sharing equipment. This reduces costs and, more importantly from the judge's point of view, reduces clutter and the interminable delays as one array of equipment is set up and another moved away as the lawyers change places.
- As Judge Alsup suggests elsewhere in his rules, bring tape to fix wires and cables.
- Check out the courtroom in advance for the best location of projections, screens, displays, easels, and the rest. Think about lines of sight: Will the judge, jury, and opposing counsel be able to see? Have you interfered with free access by those in wheelchairs or who might use crutches?
- If you have colorblind jurors, will they be able to discern your color schemes on exhibits? I had a case with a blind juror (with an assistant whispering in his ear what was being shown)- we made sure the witnesses read aloud the exhibits and so on, but some of the demonstrative exhibits were, of course useless. Good thing none was critical.
- Your projectors should probably have a "hot button" cut off mechanism, i.e. a way to instantly turn off the projection. Lawyers routinely project the wrong file, document or image on the screen (they mistook wrtk458.jpg for wrtk468.jpg). Even if your actions were inadvertent, the judge could declare a mistrial, and if the judge concludes you should have been able to stop the unauthorized view, may assign fees and costs of the other side in the first trial to you.

- To avoid the issue above, ensure that other counsel and the judge sees every image before the jury does. This is obvious from the painfully enumerated steps set out above under *Document & Exhibits*, but courtroom technology used to project images is more likely to surprise you and more so likely to cause problems.
- Advance disclosure of exhibits to the other side is the best way to handle most of the issues outlined here. Make sure they have good copies to review- i.e., copies that conform to the rules for copies set forth above, including providing color copies of color originals.
- Advance disclosure is essential for simulations, in which computer program with programmed assumptions purport to recreate certain conditions. More on simulations and animations later, but here I just note that it can take many weeks for the other side to review a simulation and its underlying code and assumptions, and the other side may call for disclosure of the source code in order to understand and test the assumptions built into the program. (Presumably the advance disclosures took place in connection with expert discovery.)
- Great high tech essentially vanishes: the message shines through and the processing of the message goes unnoticed. Lousy high tech is obvious, and gets in the way of the message. Lousy, ostentatious high tech will seem like overkill, and the jurors (perhaps at the suggestion of opposing counsel) may wonder where you or your client got all that money to put on the production—and what you are trying to distract them from.

10A. Demonstrative Evidence

Demonstrative Evidence-isn't. Evidence is that stuff which gets admitted and goes to the jury room during deliberations. There are exceptions: weapons obviously, and computerized data (such as on a DVD or CD) probably won't go to the jury room, with the judge making arrangements for the material to be viewed on the jury's request. But, usually, maps, charts, and witnesses' drawing used to show the location of the accident, plastic knees and skeletons used to describe the way the body works, and other demonstrative items are not admitted and so never go to the jury room. These are used to explain and illustrate the evidence; they are themselves not evidence. The line between (real) evidence and demonstrative items (let's not say 'evidence,' just to avoid ambiguity) can be murky, especially because evidence morphs into demonstrative items and vice-versa during trial, while no one is looking or paying attention (more on this in a minute).

Here are the three red flags signaling that you are dealing with demonstrative items, not admissible evidence: the item (1) did not exist at time of litigated facts, (2) is not a summary of other documents and/or (3) was created especially for or during trial. Unless the thing is a piece of history, as it were, an artifact from the time of the facts giving rise to the dispute, it may be simply a demonstrative item.

(True, I am exaggerating here to make a point. Demonstrative items such as maps drawn by the witness *are* sometimes actually admitted, and it may be splitting hairs when the jury, after all, does see both evidence and demonstrative items. But I must spilt these hairs to warn against the confusion I note next.)

Here's the problem: at the misguided behest of the examining attorney, witnesses take evidence and do something to the evidence in court—and thereby transmute it into a demonstrative item. This happens all the time with photographs: the witness takes the photo and writes all over it: lines, arrows, circles, and squiggles, P1 for where she was at first, P2 where she was later, P3 after that, D1, D2, and D3 to show the other guy, red and blue and green ink to indicate different vectors or people or cars, and other stuff no one remembers five minutes later. (Even better: the lawyer—who plainly hasn't thought about this for more than two seconds in advance—has the witness use little yellow sticky note papers to mark all the various positions and items. Within twenty four hours, all is lost.) Even worse: different lawyers have the same witness, or have different witnesses, make different series of marks on the same item. Do not bet on the judge stopping this chaos. If she is merciful and sees jurors in desperation trying to figure it out, she might. But there is another school of judicial philosophy sometimes devoutly urged by counsel, called "let the lawyers try their own case," a/k/a/ let 'em stew in their own juice.

Now, some of these marked-up exhibits positively glow, and put American Abstract Expressionism to shame. But it kills the piece of evidence- it turns it into a demonstrative item. Think of it this way- *enhanced* evidence becomes demonstrative. True, few lawyers will object to the introduction of the enhanced exhibit if they had no issue with the original exhibit, but the better practice is to have a separate copy with its own exhibit number. Don't mark up the original at all. Think of it from the point of the view of the appellate court: some poor clerk or judge glances at the modified item but may not be able to figure out what was added at trial (and may not be in the mood to carefully parse scattered pages of transcript, trying to find direct, cross and maybe re-direct to get it all straight).

352 Issues. In California state courts, lawyers and judges use Evidence Code section 352 to think through the prejudicial impact of evidence which is otherwise admissible, or evidence which will take an undue amount of time to present. Other jurisdictions have similar provisions. As long as the judge is pretty clearly weighing the factors for and against admission (and isn't arbitrary), the judge is *very* unlikely to be reversed on appeal. Under 352 the court has the *discretionary* power to reject what is by definition otherwise admissible. Think about that for a minute. To quote the venerable legal adage, this is huge. If the judge thinks the poster board, video clip, ten million dollar simulation, or other item is unduly prejudicial, then it's out. The jury will never see it. The same thing for evidence which just takes too long to present, or for which the foundation is too complicated and time consuming to present.

Let's take 'time consuming' first. As we'll see with animations and simulations just below, there may be several layers of admissibility which underlying data have to hurdle before the final product can be admitted. Compilations and compendia may presume the admissibility of underlying documents. Vast swathes of expert testimony in different areas may be needed before the judge is comfortable admitting a supposed re-creation of, e.g., an accident. So: see if you can get stipulations; make a deal: the judge can see yours if he can see mine. Use requests for admission to obviate issues on the admissibility of documents. Have pre-trial hearings on the admissibility of key items.

Issues of undue prejudice can arise in many ways. To be sure, the usual problem is the grisly photograph, specifics from autopsy reports, and so on. But the manner of presentation of otherwise innocuous data itself can generate problems. Just as forensic graphical consultants have ideas on color schemes and other circumstances designed to heighten the impact of an exhibit, the other side will desire to block the use of those supposed mind altering effects. Words and pictures can be taken out of context. A word or phrase may be highlighted or emphasized, and in a case where, for example, the obviousness of a word or phrase is the issue, that will doubtless generate loud protestations. Timelines are easily manipulated, subtly suggesting that events were closely linked, or not linked, or occurred at about the same time (or not). A form of prejudice arises, too, when the witness does not provide a foundation for every aspect of the item. For example, Google photographs are now ubiquitous: it costs virtually nothing to have a photograph of an intersection or other location, and witnesses routinely seem to authenticate them. The witnesses cannot, of course, authenticate all of it: usually the perspective is not one the witnesses ever had. But even in this day of Photoshop, photographs are very powerful: no juror will doubt their accuracy. Of course the trees are there, the lines on the road, and the perspective showing the oncoming traffic. This may or may not be a problem: if an issue at trial is whether something was visible from e.g., the driver's seat, the problem may be fatal.

Undue prejudice with exhibits comes in many ways. (Many of these apply to animations and simulations as well, discussed in more detail in the next section.) The exhibit may:

- Show perspective or a field of view no witness had or could have had. For reasons discussed below, this will not be a problem with simulations, but it may be a serious issue with demonstrative exhibits;
- Speed up or slow down an actual event, perhaps misleading the jury into believing something about how much time someone had to do something;
- Show more or less lighting than originally available;
- reveal more or less field of view;
- reveal more or fewer background items in scene (or arbitrarily place them or indeed invent them);
- affect the attention the viewer places on an isolated event. Every photo or video literally creates a frame around an event or moment or thing—it's the very definition of "20-20 hindsight". This alone can unfairly suggest to the jury that the event or thing was as obvious then in its context and it is now in court.
- Include aspects (such as sound) that the creator of the exhibit just invented to create a mood or feeling. As we know, music can be extremely evocative. I recall a case in which the tenant, complaining of loud music from a neighbor, wishes to play the accused stereo system in court at the same purported level as at the apartment. This was a difficult problem- would it really sound "the same" in my sound-proofed court even at the same level?

These problems have a variety of labels in the Evidence Code: aside from the obvious 352 objection, we might ask whether the exhibit is in effect *coaching* the witness, or leading, or argumentative.

Completeness is a nice problem. Once a party has introduced a bit of a document the other side has the right to introduce other bits of it to ensure a fair context, that the jury has a complete picture. But there are two complementary problems: (i) it may not be necessary to admit the entire 1,700 page SEC filing to explain a sentence on p. 93, and (ii) it can be very difficult to determine what the "whole" document *is*, i.e. what does or does not belong as part of the context for the bit originally admitted. This latter issue comes up repeatedly with electronic documents, such as string of emails, web sites, databases, and more, each of which are agglutinations of various writings created at various times which relate to each other only in part.

A request: try not to spring this stuff on the judge in the middle of cross examination.

10B. Animations ≠ simulations

The terms animation and simulation are occasionally mixed up. That is not helpful, for the same reasons that demonstrative and admissible evidence ought not be confounded. An animation is, usually, *illustrative* and not evidence, whereas a simulation is admitted evidence (you hope). But here's the rub: One cannot tell, simply from looking at a video of, say a computer generated car swinging around a computer generated curve on a computer generated hill and hitting another computer generated car (imagine the digital squeal of tires, smoke as the brakes are applied, the recreated sound of metal on metal) one cannot tell, as I say, whether the video is an animation or simulation. And the judge cannot rule until he knows which it is. It up to the lawyer to let the judge know, and this depends on the lawyer knowing the difference.

An animation is no better than a drawing on a tablet during examination, and just illustrates what the witness is trying to get across. Just as a witness might draw a hill, a line for the road, a blue box for his car coming around the curve and a red box for the other guy, with perhaps dotted lines showing the trajectory of his car, so too he might have assisted in the digital re-creation of the scene, with animation experts simply following his instructions and assembling something which he testifies on the stand is an accurate representation of what happened as he saw it. In this sort of situation, not much foundation is needed, and everyone knows who to cross examine on the matter: The testifying witnesses, not the animator or the other dozen people who might have had a hand in the creation of the demonstrative exhibit. And if the witnesses can't provide the foundation ("I have no idea if the car crossed the centerline as it does in the video") then the jury should not see it.

Simulations are radically different. A simulation is a re-creation of a situation which no one may have ever seen—and yet be admissible. It comes in as real evidence. The jury might ask to see it again during deliberations, and, as opposed to how the court would handle demonstrative items, the court would normally accommodate the request.

A simulation is software speaking. It's as good and as bad as its input and assumptions, just like any software. We trust (if we do) our bank statements and temperature reports from across the United States because we think the inputs were correct (the amount and date on the check, the sensor readings at Tampa Florida and Concord New Hampshire) and the processing software is accurate (it accurately adds the sums on the checks, and accurately averages the hourly

temperatures in Concord to get a daily number). We trust the system as a whole, so we rely on the output. So too with simulations. One might have, for example, a simulation of the movement of contaminants in groundwater. No one is actually down there, two hundred feet below the surface, watching and counting and timing the molecules of chemicals. Instead, we use experts to (i) tell us about the nature of the soil or rock at that location, its permeability, the amount of chemicals released and their propensity to infiltrate surrounding materials at various rates, the pressure of the hydraulic system, and so on and so forth, (ii) generate algorithms that account for these facts, and (iii) run the program. Lo and behold, the chemicals will (or will not) flow from here to there in such and such a time period. We can use simulations to tweak the assumptions (how much did it rain?) and get a range of likely results.

Simulations are also used with events that were literally, at some level, observed by humans, but which either (i) produce evidence concerning the reliability of the eyewitness testimony, or (ii) shows facts at a level no human could have perceived. Take a collapsing construction crane. In the ensuing personal injury trial, witnesses testify a third party truck crashed into it, causing it to twist and collapse. Simulations based on facts about the strength of the metal and its behavior under stress might show that the crane would have collapsed anyway, that the truck could not have caused it to twist. The simulation might create a slow motion view, teasing out critical sequences of events, which experts testify must have happened in such a sequences to account for the evidence such as the arrangement of debris, the characteristics of the steel and so on.

This sort of thing is done with aviation accidents, to test out a series of hypotheses which is a way, as it were, to reverse-engineer the cause when the eyewitness are dead. Known facts about the airplane (staling speed, weight, altitude, speed at the time, etc.) are assumed and then experiments are conducted to reach the observed result, such as the configuration of debris, the fact that propellers appeared to be turning at impact, and so on. If the inputs and algorithms are valid, and only one set of assumptions fits the observed facts (e.g. the assumption that the altimeter must have iced over and the pilots increased the stalling speed by pulling the nose up), then the simulation may be evidence of that hypothesized cause.

The depiction of an animation or simulation is subject to all the 352 issues noted above with evidence generally, and is an issue which is entirely independent of whether animation is endorsed by the testifying witness or the simulation has the proper foundation. Too much is left in, certain colors are used, items or points of view are misleadingly emphasized, sound is slyly used—all these may be issues.

Prejudice may be a function not so much of what is in, but what has been left out. This is especially a problem in simulations and animations, because by definition each is an abstraction of real events, which must mean a reduction in complexity. Recall the etymology of abstraction: to drawn or drag away, detach or divert, in effect to *take away.* Real word events are of infinite complexity: we can dig as deep as we wish into minutia, or expand as much as we desire to new contexts and perspectives. Animations and simulations are simplistic models of supposed real world events; they are therefore always wrong; but (we hope) not a in material way. Physicist Phillip Anderson said in his 1977 Nobel acceptance speech, “The art of model building is the exclusion of real but relevant parts of the problem, and entails hazards for the builder and the reader. The builder may leave out something genuinely relevant; the reader, armed with too

sophisticated an experimental probe or too accurate a computation, may take literally a schematized model whose main aim is to be a demonstration of possibility."

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I have gone through this at some length to generate an intuition as to the distinction between animations and simulations, because the foundations for the two are so profoundly different, and because at trial *it is too late* to remedy misunderstandings about that difference. When it comes to simulations, many layers of expertise may be needed before the jury can see the final product, and unless lawyers are sensitive to the fact that these experts must be disclosed pre-trial, the judge is unlikely to admit the fruits of their labors. With an simulation, there usually is no eye witness to examine: One is in effect examining the experts who collected the data (and perhaps the eyewitness who observed the data, or experts who testify that the collected data is the sort of thing experts rely on) and the experts who created the algorithm. The other side may claim that it desires, pre-trial, to examine the (1) source code of the programs used to perform the analyses (the algorithm) and (2) all data inputs and (3) software used to create the displays (i.e. video) based on the algorithm's output. For imaginative but deeply antagonistic counsel, there is endless room here for stunningly expensive discovery disputes on trade secrets, burdens, and scope of expert discovery.

But that would be a Sin.

You know which one.

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Resources

Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial
http://www.fjc.gov/public/pdf.nsf/lookup/CTtech00.pdf/$file/CTtech00.pdf
http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2009_1/schofield
http://criminaldefense.homestead.com/Technology.html

Harold Weiss & J.B. McGrath, Jr., "Technically Speaking: Oral Communication for Engineers, Scientists and Technical Personnel" (1963)(72 hours after presentation, typical juror will retain only 10% of verbally presented information)

Dr. Damian Schofield, "Animating Evidence: Computer Game Technology in the Courtroom," http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2009_1/schofield (includes references to many studies)

K. Fulcher, "The Jury as Witness: Forensic Computer Animation Transports Jurors to the Scene of a Crime or Automobile Accident," 22 U. Dayton L. Rev. 55 (1996), http://heinonline.org/HOL/Page?handle=hein.journals/udlr22&div=9&g_sent=1&collection=journals

E. Tufte:
http://www.edwardtufte.com/tufte/
Books: *Beautiful Evidence; Envisioning Information*
This is essential reading for all whom would communicate with graphics. Tufte's magisterial (I have *always* wanted to use that word) writing on the demons and dangers of PowerPoint, "The Cognitive Style of PowerPoint: Pitching Out Corrupts Within," is available at http://www.edwardtufte.com/tufte/powerpoint

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"Alsup Singles Out Oakland Solo for 'Abe Lincoln' Approach" by Ginny LaRoe, LegalPad (Recorder Blog)

William Alsup, the exacting San Francisco judge probably known as much for delivering dressing downs as for his legal acumen, recently offered a piece of advice for lawyers who appear before him.

"Do what Abe Lincoln did when he was a lawyer," the judge said last week in an interview with The Recorder. By that he means: limit yourself to arguing a couple of winning issues.

Is it possible to live up to that standard? Well, meet Randy Sue Pollock.

The Oakland criminal defense solo spent the better part of the last six months before Alsup representing one of seven MS-13 gang members in a grueling racketeering trial. She had the "courage," Alsup offered when talking in general about tips for litigators, to take the "less is more" approach.

"Randy Sue Pollock got an acquittal in that case," Alsup said, "and she had the fewest number of questions, the shortest opening statement, the shortest closing argument, and there were many witnesses she didn't even examine."

The judge didn't stop there.

"She had a very clear-cut agenda to zero in on one or two key issues. She did that very effectively, and at the end of the day, the jury gave her a complete acquittal of her client."

Yes, there's more.

"And I'm not taking anything away from any of the other lawyers ... I think the lawyers were excellent." (He didn't name any other names.) "Her approach of less-is-more was completely vindicated at the end."

Said Pollock when told of the exaltation: "That's amazing."

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Judge's Trial Guidelines

The following trial guidelines from both state and federal courts, also known as standing orders, are provided not so much to have lawyers perform as instructed (unless you are appearing before that judge), but to indicate the sort of thing judges seem to care about. (Some of the guidelines here have been shortened from the original to eliminate provisions that do not relate directly to trial, and some are now outdated.)

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1. Motions

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Please deliver courtesy copies directly to Department 50.

2. Trials

Trials begin at 9:30 a.m, and final status conferences begin at 8:30 a.m. During trial, counsel may have continuing permission to approach witnesses, unless there is some hostility among the parties, the witnesses, and counsel. Side bar conferences are practically and logistically difficult. Any matters that must be heard outside the presence of the jury may be discussed at a break, unless it is an evidentiary emergency that cannot wait until a break.

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6. Pretrial motions

All pretrial motions, including motions in limine and motions that affect the order of proof, such as motions pursuant to Code of Civil Procedure Sections 597 (trial of special defenses), 598 (change in the order of proof or bifurcation of the trial), and 1048 (consolidation or severance), must be filed and served with sufficient statutory notice under Section 1005 of the Code of Civil Procedure so that they may be heard at the final status conference. Motions in limine must comply with Local Rule 3.57 and Kelly v. New West Federal Savings, 49 Cal. App. 4th 59, 670-71 (1996).

7. Trial documents

The parties are to meet and confer and file on the fifth court day prior to the final status conference, with courtesy copies delivered to Department 50, the following documents:

(a) Joint List of Stipulated Facts

The parties are to list all relevant facts not in dispute that can be read to the jury as stipulated facts.

(b) Joint Witness List

The parties are to submit a joint list of all witnesses that each party intends to call, except for impeachment or rebuttal witnesses. The joint witness list must include the name of each witness who is actually going to testify, whether that person is a fact witness or an expert witness, and the expected length of the direct and cross examination of that witness. Unless good cause is shown, no undisclosed witnesses may be called.

(c) Joint Exhibit List

The parties are to comply with the rules for numbering exhibits set out in Local Rules 3.25(h), 3.52, 3.53, and 3.151. In complying with Local Rules 3.52 and 3.53, the parties are to meet and confer in an effort to resolve all objections to each exhibit to be offered at trial. The joint exhibit list must reflect counsel's agreements and disagreements concerning the admissibility of exhibits by including a column in which the parties indicate whether the particular exhibit may be admitted without objection and, if not, the ground of each objection to each exhibit.

Counsel must bring to trial at least four notebooks or binders of exhibits: one for opposing counsel, one for the witness, one for the courtroom clerk, and one for the court. The exhibits must be tabbed with exhibit numbers that correspond to those on the joint exhibit list.

Any exhibit or other visual or auditory aid that counsel wishes to use in opening statement must be shown to each other party at or in advance of the final status conference. See Rule 3.97.

(d) Jury instructions

Use of the Civil Jury Instructions approved by the Judicial Council of California (CACI) is strongly encouraged. Rule 855, California Rules of Court. In submitting CACI instructions, the parties must submit the edited text of each such instruction, and not just a list of CACI numbers. In other words, all choices of alternative wording should be made and extraneous language and brackets deleted. The parties are to comply with Local Rules 3.25(h) and 3.171. Counsel should present the instructions in the order that counsel would like the court to read them.

After having met and conferred, the parties are to submit requested jury instructions grouped into the following three categories: (1) instructions to which there is no objection, (2) instructions requested by the plaintiff to which the defendant objects, and (3) instructions requested by the defendant to which the plaintiff objects.

(e) A statement of the case

See Local Rules 3.25(h), 3.48(b).

(f) Relief prayed

A detailed written statement of the relief claimed, including itemization of all elements of damages claimed.

(g) Proposed verdict form

See Local Rule 3.25(h).

(h) Identification of discovery to be offered as testimony

If depositions, responses to written discovery, or other discovery materials are to be used in lieu of live testimony, the party proposing to do so must identify and state in writing all such excerpts (other than for impeachment) to be used. Opposing parties must state their objections, if any. The court will try to rule on the objections at the final status conference

8. Department 50

The civil courts exist for you and your clients. Your suggestions, even if anonymous, on improving procedures in Department 50 are welcome.

JOHN L. SEGAL
JUDGE OF THE SUPERIOR COURT
Los Angeles

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Judge Emile H. Elias
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If a matter is not going to proceed, or if it is taken off calendar, counsel are to call the Court as soon as possible. When the Court is not advised, significant staff and judicial time is spent working up motions that will not be heard.

Counsel are requested to provide 2 business cards when they check in. Parties using CourtCall need to take the call from a quiet location. It is very difficult when someone on CourtCall is using a cell phone or in a busy location. It makes it difficult for everyone in the courtroom to hear the matter.

Counsel need not stand to argue, but are welcome to do so if that is more comfortable to them. A podium is also available. An Elmo and projector are available free for the use of counsel.

It is a rare occasion when your matter is not heard at the time it is set. Thus, promptness is appreciated. If the Court will be delayed in hearing your matter, every effort will be made to give notice in advance.
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LOCAL, LOCAL RULES:
Department 324 has no “Local, Local Rules.”

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GUIDELINES FOR TRIAL AND FINAL PRETRIAL CONFERENCE IN CIVIL BENCH CASES BEFORE THE HONORABLE WILLIAM ALSUP FRCP 26(a)(3)

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FINAL PRETRIAL CONFERENCE

2. At least **SEVEN CALENDAR DAYS** in advance of the final pretrial conference, please file the following: (a) A joint proposed final pretrial order, signed and vetted by all counsel, that contains: (i) a brief description of the substance of claims and defenses which remain to be decided, (ii) a statement of all relief sought, (iii) all stipulated facts, (iv) a list of all factual issues which remain to be tried, (v) a joint exhibit list in numerical order, including a brief description of the exhibit and Bates numbers, a column for when it is offered in evidence, a column for when it is received in evidence, and a column for any limitations on its use, and (vi) each party's separate witness list for its case-in-chief witnesses (including those appearing by deposition) providing, for all such witnesses other than an individual plaintiff and an individual defendant, a short statement of the substance of his/her testimony and, separately, what, if any, non-cumulative testimony the witness will give (to be used to set time limits). Items (v) and (vi) should be appendices to the proposed order. (b) Any motion *in limine*, with the opposition, filed as follows: At least **TWENTY CALENDAR DAYS** before the conference, serve, but do not yet file, the moving papers. At least **TEN CALENDAR DAYS** before the conference, serve the oppositions. When the oppositions are received, the moving party should collate the motion and the opposition together, back to back, and then file the paired sets at least **SEVEN CALENDAR DAYS** before the conference. Each motion should be presented in a separate memo and numbered as in, for example, "Plaintiff's Motion in Limine No. 1 to Exclude . . . ." Please limit motions *in limine* to circumstances that really need a ruling in advance. In bench trials, usually three or fewer motions per side is sufficient at the conference stage (without prejudice to raising matters *in limine* as the trial progresses). Each motion should address a single topic, be separate, and contain no more than seven pages of briefing per side. (c) Copies of the Rule 26(a)(3) disclosures. (d) Each side's proposed findings of fact and conclusions of law. (e) Trial briefs are optional.

3. The above shall be submitted in *Word Perfect X3 or 10 format* to whapo@cand.uscourts.gov and in hard copies. *All hard-copy submissions should be three-hole punched on the left, so the judge's copy can be put in binders. Please provide them at least seven calendar days prior to the pretrial conference for the judge's study and review — THIS IS IMPORTANT.*

4. At the final pretrial conference, counsel must take notes on rulings and later submit a joint summary of all rulings in proposed-order format.

PRETRIAL ARRANGEMENTS

5. Should a daily transcript and/or real-time reporting be desired, the parties shall make arrangements with Deb Campbell …..

6. Counsel are encouraged to use overhead projectors, laser-disk/computer graphics, poster blow-ups, models or specimens. The Court provides no equipment other than an easel. The United States Marshal requires a court order to allow equipment into the courthouse. For electronic equipment, either know how to fix it or have a technician handy. For overhead projectors, have a spare bulb. Tape extension cords to the carpet for safety. Please take down and

store the equipment (in the courtroom) at the end of each court day. Please work with Dawn Toland… on courtroom-layout issues.

SCHEDULING

7. The normal trial schedule will be 8:00 a.m. to 1:00 p.m. (or slightly longer to finish a witness) with two fifteen-minute breaks and ending before lunch. Counsel must arrive by 7:30 a.m. The trial week is usually Monday through Friday.

OPENING STATEMENTS

8. Each side will have a time limit for its opening statement (to be determined at the final pretrial conference). Counsel must cooperate and meet and confer to exchange any visuals, graphics or exhibits to be used in the opening statements.

WITNESSES

9. Except for good cause, all counsel are entitled to written firm notice of the order of witnesses for the next court day and the exhibits (including merely illustrative exhibits) to be used on direct examination (other than for true impeachment of a witness). The Court encourages two days notice, *i.e.*, written notice by 2:00 p.m. on the *second* calendar day before the witnesses testify or the exhibit is used. At a minimum, notice must be no later than 2:00 p.m. on the calendar day *immediately* preceding. If two days written notice is given or two days notice is given that no documents will be used, then all other counsel must give written notice of all other exhibits to be used on cross-examination (except for true impeachment) by 2:00 p.m. on the calendar day immediately preceding the testimony; otherwise, other responding counsel need not give notice of exhibits they may use. Any exhibit timely noticed by anyone for the witness is usable as if timely noticed by everyone, subject to substantive objections. Similarly, if reference is made to an exhibit during an examination (even if not offered in evidence and even if not noticed for use with the witness), then in any follow-up examination by others, the exhibit may be used to the same extent as if it had been timely noticed, subject to substantive objections. All notices shall be sent by fax or electronically and be time-and-date verifiable. If counsel decides not to call a noticed witness, then prompt written notice of the cancellation must be given. Impeachment exhibits are ordinarily limited to statements signed by or adopted by the witness. Compliance with a two-day notice period, of course, will not satisfy compliance with FRCP 26 or any other disclosure rule.

10. The official tagged exhibit should be shown to witnesses — not supposed copies or notebooks of supposed copies. Before the examination begins, retrieve the official tagged exhibits to be used and have them at the ready. Using copies leads to discrepancies between the exhibit actually introduced into the record (*always* the official tagged exhibit) versus the stray before the witness. The required procedure also helps find any glitches in the official tagged exhibits.

11. Always have your next witness ready and in the courthouse. Failure to have the next witness ready or to be prepared to proceed with the evidence will usually constitute resting. If counsel plans to read in a transcript of a deposition anyway, it is advisable to have a deposition prepared and vetted early on to read "just in case."

12. When there are multiple parties, counsel are responsible for coordination of the cross-examination to avoid duplication. Stand at or near the microphone to ask questions, straying only to point out material on charts or overheads. Please request permission to approach the witness or the bench.

EXPERTS

13. A recurring problem in trials is the problem of expert witnesses trying to go beyond the scope of their expert reports on direct examination. FRCP 26(a)(2) and FRCP 37(c) limit experts to the opinions and bases contained in their timely reports (absent substantial justification or harmlessness). The Court regularly enforces these rules. FRCP 26(a) also requires that any "exhibits to be used as a summary of or support for the opinions" be included in the report. Accordingly, at trial, the direct testimony of experts will be limited to the matters disclosed in their reports. New matter may not ordinarily be added on direct examination. This means the reports must be complete and sufficiently detailed. Illustrative animations, diagrams, charts and models may be used on direct examination only if they were part of the expert's report, with the exception of simple drawings and tabulations that plainly illustrate what is already in the report, which can be drawn by the witness at trial or otherwise shown to the jury. If cross-examination fairly opens the door, however, an expert may go beyond the written report on cross-examination and/or re-direct examination. By written stipulation, of course, all sides may relax these requirements. Material in a "reply" report must ordinarily be presented in a party's rebuttal (or sur-rebuttal) case *after* the other side's expert has appeared and testified.

14. Another recurring problem is the retained expert who seeks to vouch for the credibility of fact witnesses and/or to vouch for one side's fact scenario. Qualified experts, of course, are always welcome to testify concerning relevant scientific principles, professional standards, specialized facts known within a trade or discipline and the like. They are also welcome to apply those principles and standards to various assumed fact scenarios. This is so even if an opinion is given on the "ultimate issue." But they should not try to vouch for one side's fact scenario. *i.e.*, witness believability.

15. There is an important exception. Experts and doctors who perform scientific tests, site visits or treat victims, among other possibilities, may testify to their findings within the scope of their firsthand knowledge. This is because they have made personal observations and have reached professional judgments based thereon. Carrying this one step further, even a retained expert may read a financial statement in evidence, watch a video in evidence, listen to a recording in evidence and so on, and offer opinions based on the contents. This is because the contents themselves are clearly defined.

16. As to damages studies, the cut-off date for *past damages* will be as of the expert report (or such earlier date as the expert may select). In addition, the experts may try to project *future damages* (*i.e.*, after the cut-off date) if the substantive standards for future damages can be met. With timely leave of Court or by written stipulation, the experts may update their reports (with supplemental reports) to a date closer to the time of trial.

USE OF DEPOSITIONS TO IMPEACH AND SHORT READ-INS

17. Depositions can be used at trial to impeach a witness testifying at trial or, in the case of a party deponent, "for any purpose." Please follow the following procedure: (a) On the first day of trial, be sure to bring the original and clean copies of any deposition(s) for which you are responsible. Any corrections must be readily available. If you are likely to need to use the deposition during a witness examination, then give the Court a copy with any witness corrections at the outset of your examination. This will minimize delay between the original question and the read-ins of the impeaching material. Opposing counsel should have their copy immediately available. (b) When you wish to read in a passage, simply say, for example: "I wish to read in page 210, lines 1 to 10, from the witness' deposition." A brief pause will be allowed for any objection. (c) When reading in the passage, state "question" and then read the question exactly. Then state "answer" and then read the answer exactly. Stating "question" and "answer" is

necessary so that the judge and court reporter can follow who was talking at the deposition. (d) The first time a deposition is read, state the deponent's name, the date of the deposition, the name of the lawyer asking the question, and if it was FRCP 30(b)(6) deposition, please say so. (e) Please do **NOT** ask, "Didn't you say XYZ in your deposition?" The problem with such a question is that the "XYZ" rarely turns out to be exactly what the deponent said and is part spin. Instead, ask for permission to read in a passage, as above, and read it in exactly, without spin. (f) Subject to Rule 403, party depositions may be read in whether or not they contradict (and regardless of who the witness is on the stand). For example, a short party deposition excerpt may be used as foundation for questions for a different witness on the stand. (g) Rather than reading the passage, counsel are free to play an audiovisual digitized version of the passage but counsel must have a system for immediate display of the precise passage.

DEPOSITION DESIGNATION

18. The following procedure applies only to witnesses who appear by deposition. It does not apply to live witnesses whose depositions are read in while they are on the stand. To save time and avoid unnecessary work, it is not necessary to make all deposition designations before trial (as normally required by FRCP 26(a)(3)(A)(ii)). In the Court's experience, by the time the read-in occurs, the proponent has usually reduced substantially the proposed read-ins. Instead, the following steps should be followed. (a) To designate deposition testimony, photocopy the cover page, the page where the witness is sworn, and then each page from which any testimony is proffered. Line through or x-out any portions of such pages not proffered. Also, line through objections or colloquy unless they are needed to understand the question. Please make sure any corrections are interlineated and that references to exhibit numbers are conformed to the trial numbers. Such interlineations should be done by hand. The finished packet should then be the actual script and should smoothly present the identification and swearing of the witness and testimony desired. The packet should be provided to all other parties at least **FIVE CALENDAR DAYS** before it will be used in court. For the rare case of voluminous designations, more lead time will be required. Please be reasonable. (b) All other parties must then promptly review the packet and highlight in yellow any passages objected to and write in the margin the legal basis for the objections. If any completeness objection is made, the objecting party must insert into the packet the additional passages as needed to cure the completeness objection. A completeness objection should normally be made only if a few extra lines will cure the problem. Such additions shall be highlighted in blue and an explanation for the inclusion shall be legibly handwritten in the margin. Please line out or x-out any irrelevant portions of the additional pages. (c) The packets, as adjusted, must then be returned to the proffering party, who must then decide the extent to which to accept the adjustments. The parties must meet and confer as reasonable. Counsel for the proffering party must collate and assemble a final packet that covers the proffer and all remaining issues. At least **TWO CALENDAR DAYS** before the proffer will be used, the proponent must provide the Court with the final packet, with any objected-to portions highlighted and annotated as described above. If exhibits are needed to resolve the objections, include copies and highlight and tag the relevant passages. Alert the Court on the record that the packet is being provided and whether any rulings are needed. *Tag all passages that require a ruling.* The Court will then read the packet and indicate its rulings. Ordinarily, argument will not be needed. (d) Counter designations must be made by providing a packet with the counter-designated passages to the proponent at the same time any objections to the original proffer are returned to the first proffering party, who must then supply its objections in the same manner. (e) When the packet is read in court, the examiner reads the questions (and

any relevant colloquy) from the lectern and a colleague sits in the witness stand and reads the answers. When a video-taped deposition is to be played instead, the packets must still be prepared, as above, in order to facilitate rulings on objections. The video should omit any dead time, long pauses, and objections/colloquy not necessary to understand the answers.

REQUESTS FOR ADMISSIONS AND INTERROGATORIES

19. Please designate responses to requests for admissions and interrogatory answers in the same manner and under the same timetable as depositions.

EXHIBITS

20. As stated, FRCP 26(a)(3) disclosures regarding proposed exhibits must be made at least **THIRTY CALENDAR DAYS** before trial and any objections thereto must be made within **FOURTEEN CALENDAR DAYS** thereafter (or waived unless excused for good cause). The joint list must be filed **SEVEN CALENDAR DAYS** in advance of the final pretrial conference (as per paragraph 2 above). By designating an exhibit, a party waives any objection to it if offered by the other side (even if not designated by the other side) except for objections based on Rule 402 or Rule 403. Nor will there be any waiver with respect to admissions by party opponents, *i.e.*, such admissions may be designated without waiving the objection that the same items would be self-serving hearsay if offered by the other side. Nor will there be a waiver if the designation is qualified to be operative only in a specified contingency, such as only if issue X is eventually deemed relevant by the Court. If, however, that contingency materializes, then such designated materials may be used by the other side, subject to the Rule 702, 703 and 801(d)(2) qualifications stated above.

21. Prior to the final pretrial conference, counsel will please meet and confer in person over all exhibit numbers and objections and to weed out duplicate exhibits and confusion over the precise exhibit. Use numbers only, not letters, for exhibits, preferably the same numbers as were used in depositions. Blocks of numbers should be assigned to fit the need of the case (*e.g.*, Plaintiff has 1 to 100, Defendant A has 101 to 200, Defendant B has 201 to 300, etc.). A single exhibit should be marked only once, just as it should have been marked only once in discovery (if this Court's guidelines were followed). If the plaintiff has marked an exhibit, then the defendant should not re-mark the exact document with another number. Different *versions* of the same document, *e.g.*, a copy with additional handwriting, must be treated as different exhibits with different numbers. To avoid any party claiming "ownership" of an exhibit, all exhibits shall be marked and referred to as "Trial Exhibit No. _____," not as "Plaintiff's Exhibit" or "Defendant's Exhibit." If an exhibit number differs from that used in a deposition transcript, then the latter transcript must be conformed to the new trial number if and when the deposition testimony is read to the jury (so as to avoid confusion over exhibit numbers).

22. The exhibit tag shall be in the following form: [omitted] Place the tag on or near the lower right-hand corner or, if a photograph, on the back. Counsel should fill in the tag but leave the last two spaces blank. The parties must jointly prepare a *single* set of all trial exhibits that will be the official record set to be used with the witnesses and on appeal. Each exhibit must be tagged and in a separate folder (not in notebooks). Deposit the exhibits with the deputy clerk (Dawn Toland) on the first day of trial.

23. Please move exhibits into evidence as soon as the foundation is laid and it is fresh in the judge's mind. Do not postpone motions and expect the judge to remember the foundation. Counsel must consult with each other and with the deputy clerk at the end of each trial day and compare notes as to which exhibits are in evidence and any limitations thereon. If there are any differences, counsel should bring them promptly to the Court's attention.

24. Any objections ordinarily must have been preserved under FRCP 26(a)(3). However, evidence that is cumulative or excludable under Rules 402–403 may possibly be excluded even if no objection has been preserved under FRCP 26(a)(3).
25. In addition to the official record exhibits, a *single, joint* set of bench binders containing a copy of the exhibits only (usually the combined top twenty will do) should be provided to the Court on the first day of trial. Each exhibit must be separated with a label divider (an exhibit tag is unnecessary for the bench set). In large letters, the labels should say the exhibit number on the binders. Please use binders thin enough to lift with one arm and with locking rings.

OBJECTIONS DURING EXAMINATION

26. Counsel shall stand when making objections and shall not make speaking objections. The one-lawyer-per-side rule is usually followed but will be relaxed to allow young lawyers a chance to perform.

TIME LIMITS

27. Ordinarily, the Court shall set fixed time limits at the final pretrial conference. All of your examination time (whether direct, cross, re-direct or re-cross) for all witnesses must fit within your time limit and you may allocate it as you wish. Opening and closing time limits shall be *in addition to* your examination allocation.

SETTLEMENTS AND CONTINUANCES

28. Shortly before trial or a final pretrial conference, counsel occasionally wish jointly to advise the clerk that a settlement has been reached and seek to take the setting off calendar but it turns out later that there was only a settlement "in principle" and disputes remain. Cases, however, cannot be taken off calendar in this manner. Unless and until a stipulated dismissal or judgment is filed or placed on the record, all parties must be prepared to proceed with the final pretrial conference as scheduled and to proceed to trial on the trial date, on pain of dismissal of the case for lack of prosecution or entry of default judgment. Only an advance continuance expressly approved by the Court will release counsel and the parties from their obligation to proceed. If counsel expect that a settlement will be final by the time of trial or the final pretrial conference, they should notify the Court immediately in writing or, if it occurs over the weekend before the trial or conference, by voice mail to the deputy courtroom clerk. The Court will attempt to confer with counsel as promptly as circumstances permit to determine if a continuance will be in order. Pending such a conference, however, counsel must prepare and make all filings and be prepared to proceed with the trial.
29. The Court strongly encourages law firms to permit young lawyers to examine witnesses at trial and to have an important role. It is the way one generation will teach the next to try cases and to maintain our district's reputation for excellence in trial practice.

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UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA
INITIAL STANDING ORDER FOR CASES ASSIGNED TO JUDGE S. JAMES OTERO
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... 4. Mandatory Chambers Copies: Mandatory chambers copies are required only for e-filed documents. One mandatory chambers copy must be delivered to the chambers copy box located at the door of Courtroom 1, by 12 noon the day after the document was e-filed. This mandatory chambers copy must be blue-backed and two-hole punched as if it were a manual filing, and the

caption page must indicate the date and time the document was e-filed (place date and time of filing below title of filing on the caption page). All original filings not subject to the e-filing requirements are to be filed at the filing window (Clerk's Office, Room G-19, Spring Street Courthouse), NOT in chambers and NOT in the courtroom.

5. Telephone Inquiries: Telephone inquiries regarding the status of a motion, stipulation, or proposed order are not returned. Do not call the clerk to check the docket.

6. Communications with Chambers: Counsel are not to initiate telephone calls to Judge Otero's chambers, law clerks or assistant.

… **10. Calendar Conflicts**: If there is a calendar conflict, counsel are to inform the Courtroom Deputy Clerk as soon as possible prior to the date of the conflict and are to follow the Local Rules and Federal Rules of Procedure.

… 21. Ex Parte Applications: Ex parte applications are discouraged. *Mission Power Eng'g Co. v. Cont'l Casualty Co.*, 883 F. Supp. 488 (C.D. Cal. 1995). Strictly comply with L.R. 7-19.

… 24. Trial Preparation:

a. Pretrial Conference and L.R. 16 Filings The final pretrial conference ("PTC") will be held at 9:00 a.m. on the date set by the Court, unless expressly waived by the Court at the scheduling conference. The lead trial attorney on behalf of each party must attend the PTC and all meetings in preparation thereof. A continuance of the PTC at the parties' request or by stipulation is unlikely. Failure to complete discovery is not a ground for continuance. At the PTC, parties should be prepared to discuss means of streamlining the trial, including: bifurcation; presentation of foundational and non-critical testimony by deposition excerpts, narrative summaries and stipulations as to the content of testimony; and qualification of experts by admitted resumes. The Court will also discuss settlement. If counsel fail to file the required pretrial documents or fail to appear at the PTC and such failure is not otherwise satisfactorily explained to the Court: (a) the case will be dismissed for failure to prosecute, if such failure occurs on the part of the plaintiff; (b) default judgment will be entered, if such failure occurs on the part of the defendant; or (c) the Court may take such action as it deems appropriate. Failure of counsel to strictly follow the provisions of this Order may subject the non-complying party and its attorney to sanctions and may constitute a waiver of jury trial.

b. Pretrial Documents Must Comply with the Local Rules (1) Pretrial Conference Order ("PTCO"): The [Proposed] PTCO must be lodged seven calendar days before the PTC. Parties are to consult Appendix A to the Local Rules in preparing the PTCO. In addition, parties must heed the following: (a) Include a table of contents at the beginning of the PTCO. (b) Place in "all caps" and in "bold" the separately numbered headings for each category in the PTCO (e.g., **"1. THE PARTIES"**).

(c) In specifying the surviving pleadings under section 1 of Appendix A, state which claims or counterclaims have been dismissed or abandoned (e.g., "Plaintiff's first cause of action for fraud has been dismissed.") In multiple party cases where not all claims will be prosecuted against all remaining parties on the opposing side, specify to which party each claim is directed.

(d) In drafting the PTCO, the parties must attempt to agree on and set forth as many uncontested facts as possible. These facts are usually read to the jury at the start of trial. A carefully drafted stipulation of facts will reduce the length of trial and increase jury understanding of the case.

(e) In drafting the factual issues in dispute for the PTCO, the parties must state issues in ultimate fact form, not in the form of evidentiary fact issues. The issues of fact should track the elements of a claim or defense on which the jury will be required to make findings.

(f) Issues of law should state legal issues on which the Court will be required to rule during the trial, and should not list ultimate fact issues to be submitted to the trier of fact.

(2) Memoranda of Contentions of Fact and Law: Not later than twenty-one days in advance of the PTC, each party must serve and file a memorandum of contentions of fact and law containing a summary of the parties' basic factual contentions supported by legal authority in the form of a legal brief. L.R. 16- 4.

(3) Joint Witness List: Not later than twenty-one days in advance of the PTC, the parties must submit a joint witness list in accordance with L.R. 16-5, except that the parties need not submit separate witness lists. The joint witness list must identify: (a) All witnesses who will actually testify at trial. Failure to include the name of a witness may preclude a party from calling that witness. (b) Trial Witness Estimate: The witness list and summary must give accurate time estimates for each witness to conduct direct, cross, redirect, and re-cross. Counsel must include a summary of the testimony of each witness. If more than one witness is offered on the same subject matter, each summary must enable the Court to determine if the testimony is cumulative. (c) Expert Witnesses: An expert witness's direct testimony must consist of a description of the expert's background and contents of her Rule 26 Report.

(4) Joint Exhibit List: Not later than twenty-one days in advance of the PTC, the parties must submit a joint exhibit list in accordance with L.R. 16-6.1 and Fed. R. Civ. P. 26(a)(3)(A)(iii). The list must also include an appropriate identification of each document or exhibit which the party expects to offer for impeachment purposes and those which the party may offer if the need arises. The list must be substantially in the form indicated by the following example: […] Counsel must meet and confer and stipulate to authenticity and other foundational objections. Place exhibits in binders with each exhibit properly marked and tabbed.

(5). Pretrial Exhibit Stipulation: The parties must prepare a pretrial exhibit stipulation containing each party's numbered list of all trial exhibits, with objections to each exhibit and the offering party's response. All exhibits to which there is no objection will be admitted. All parties must stipulate to the authenticity of exhibits whenever possible. Identify any exhibits whose authenticity has not been stipulated to and the specific reasons for the parties' failure to stipulate. The stipulation must be in the following form: […] The pretrial exhibit stipulation must be filed at the same time counsel lodge the PTCO. Failure to so comply may constitute a waiver of all objections.

(6) Motions in Limine Are Heard the First Day of Trial and Must Conform to the Local Rules and the Following Format: (a) The parties must file any motions in limine thirty-five days before the trial date. Any opposition must be filed seven days thereafter. Any reply must be filed seven days thereafter. In addition, five court days before the PTC, each party must deliver to chambers a three-ring binder of its motions in limine, together with the objections and replies. (b) If any of the issues addressed in said motions were raised in prior proceedings, counsel are to identify

the proceedings and relevant pleadings. (c) The binders must be clearly marked as to their content (e.g., Plaintiff's Motions in Limine Nos. 1-9) and each motion must be separated by marked dividers, identifying the particular motion. The spine of each binder must include the case name and number as well as the content of the binder. (d) Binders should only contain the points of law, no declarations. (e) Points and authorities, including motions in limine, may not exceed ten pages. Opposition to points and authorities may not exceed ten pages. Replies to points and authorities may not exceed five pages. (f) In lodging deposition transcripts, counsel must stipulate to their authenticity.

(7) Jury Instructions and Verdict Forms: At the PTC, counsel must submit the text of each jury instruction in two sets. (a) Set one consists of instructions that all parties agree should be submitted to the jury, and includes general and substantive instructions, a verdict form, and, if necessary, special interrogatories. "Substantive jury instructions" means all instructions relating to the elements of all claims and defenses in the case. Parties should also submit standard and general instructions. (b) Set two consists of instructions that are objected to. Proposed special verdict forms are to be included. This second set must include a joint statement regarding the disputed instructions, verdicts and interrogatories. In the joint statement, place the text of the disputed instruction (or verdict or interrogatory) with an identification of the party proposing it. Following that text, place the opposing party's statement of objections with legal authority in support thereof (one page or less) and proposed alternative language if appropriate. The entirety of the objection must be typed in capital letters. (c) A table of contents must be included with all jury instructions submitted to the Court. The table of contents must set forth: (i) the number of the instruction; (ii) a brief title of the instruction; (iii) the source of the instruction; and (iv) the page number of the instruction. For example: *Number Title Source Page Number (1) (Burden of Proof) (cite) (5)* (d) The Court prefers counsel to use instructions from the Manual of Model Jury Instructions for the Ninth Circuit where applicable. Where California law is to be applied, the Court requires counsel to use the State of California Judicial Council Approved Civil Jury Instructions. (e) Modifications of instructions from the foregoing sources (or any other form instructions) must specifically state the modification made to the original form instruction and the authority supporting the modification.

(8) Joint Statement of the Case and Voir Dire: The Court conducts voir dire. At the PTC, the parties must submit separate proposed voir dire questions and a one page joint statement of the case, which is read to the jury pool. The parties need not submit requests for standard voir dire questions, but should include only proposed questions specifically tailored to the parties and issues of the case.

(9) Real-Time Reporting Requirement: At the PTC, each party must submit to the Deputy Clerk a typed list of proper names, unusual or scientific terms, or any other uncommon words that are likely to be used during the trial.

c. Bench Trial: (1) Findings of Fact and Conclusions of Law: The parties must lodge their proposed findings of fact and conclusions of law no later than seven days before trial and deliver to chambers a digital copy of these findings in WordPerfect format. L.R. 52-1. (2) Narrative Statements: The judge requires that the direct testimony of a witness be presented by written narrative statement subject to cross-examination at trial, to be adopted by the witness orally in open court, unless such requirement is waived. L.R. 43-1.

d. **Installation of equipment**- If counsel need to arrange for the installation of thier own additional equipment, such as a video monitor, overhead projector, etc., refer to the Court website at www.cacd.uscourts.gov under "Services" in order to reserve this equipment so that necessary arrangements can be made. ELMO reservations/tutorials may be made through the Space and Facilities Help Desk, (213) 894-1400.
e. **Voluminous exhibits:** Arrangements for bringing voluminous exhibits into the courtroom may be made through Space and Facilities Help Desk.

25. Instructions Governing Procedure During Trial a. Civil trials are held Monday through Friday from 8:30 a.m. to 11:30 a.m. and from 1:00 p.m. to 4:00 p.m. b. Opening statements, examination of witnesses, and closing arguments should be made from the lectern only. c. Counsel shall not refer to their clients or any witness by their first names during trial. e. When objecting, counsel shall state only that counsel is objecting and the legal ground of the objection, e.g., hearsay, irrelevant, etc. Counsel shall *not* argue an objection before the jury. f. Counsel shall *not* approach the Courtroom Deputy Clerk or the witness box without the Court's permission. g. Counsel shall return to the lectern when his or her purpose has been accomplished. h. Counsel shall *not* enter the well of the Court without the Court's permission. i. Counsel shall rise when addressing the Court. In jury cases, please rise when the jury enters or leaves the courtroom. j. Counsel shall address all remarks to the Court. k. Counsel shall not directly address the Courtroom Deputy Clerk, the reporter, or opposing counsel. l. If counsel wish to speak with opposing counsel, counsel shall ask permission to talk to counsel OFF THE RECORD. m. All requests for the re-reading of questions or answers or to have an exhibit placed in front of a witness shall be addressed to the Court. n. Counsel shall not make an offer of stipulation unless counsel has conferred with opposing counsel and reached an agreement. o. While the court is in session, counsel shall not leave the counsel table to confer with investigators, secretaries, or witnesses unless permission is granted in advance. p. When a party has more than one lawyer, only one may conduct the examination of any given witness and only that same lawyer may handle objections during the testimony of that witness. q. If a witness was on the stand at a recess or adjournment, counsel shall have the witness back on the stand and ready to proceed when Court resumes. r. Counsel shall not run out of witnesses. If counsel is out of witnesses and there is more than a brief delay, the Court may deem that counsel has rested. s. The Court attempts to cooperate with doctors and other professional witnesses and will, except in extraordinary circumstances, accommodate them by permitting them to be out of sequence. Counsel should anticipate any such possibility and discuss it with opposing counsel. If there is an objection, counsel shall confer with the Court in advance. t. Counsel are advised to be on time as the Court starts promptly. u. Counsel should not by facial expression, nodding, or other conduct exhibit any opinions, adverse or favorable, concerning any testimony which is being given by a witness. Counsel should similarly admonish their own clients and witnesses to avoid such conduct. v. SPEAK UP when making an objection, the acoustics in the courtroom make it difficult for all to hear an objection when it is being made. Failure to conform with this Order may be deemed a waiver of trial by jury and may result in sanctions. The Local Rules and Federal Rules of Civil Procedure control any issue not specifically addressed in this Order. For further information regarding the Court's preferences, refer to www.cacd.uscourts.gov > Judges' Procedures and Schedules
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Department 608 Guidelines

Curtis E.A. Karnow, Judge

1. *Motions.* Motions and case management conferences are usually scheduled for Fridays at 1.30 or 2.30 p.m. *[2011:* Until further notice, due to budget issues, hearings will usually be set at 9:00 a.m. or 4:00 p.m. Monday through Thursday.] Counsel must confirm opposing counsel's availability and check with the Court's clerk at 551-3833 to confirm the Court's availability prior to noticing the motion and prior to seeking a continuance, even when the continuance is by stipulation.

In limine motions. Counsel must meet and confer on these motions and advise the Court on the first day of trial which remain in dispute. Please review Kelly v. New West Federal Savings, 49 Cal. App. 4th 659 (1996) and Amtower v. Photon Dynamics, Inc., 158 Cal.App.4th 1582 (2008) before drafting these motions. Motions which seek to exclude evidence must specify the evidence sought to be excluded.

2. Trial Schedule and Jury selection

Trial is ordinarily scheduled 9:00 – 3.30 or 4.30 p.m., Monday-Thursday, and to Noon on Fridays. [2011: Until further notice, due to budget issues, trial will not be conducted on Fridays.] Parties must have witnesses ready to call during these periods or may be deemed to have rested their case.

Counsel should be prepared for a one to two minute 'mini opening' just before the hardship phase. A panel of 24 will be called at voir dire, and counsel normally have 20 minutes for questions, with an additional 10 minutes for each filling of the box (usually about 12 panelists). More time may be allowed at counsel request, if required by the facts of the case. The Court will ask questions proposed by counsel if they may assist with a cause challenge.

Counsel may stipulate that alternates be selected from the group of jurors (where more than 12 were originally selected) immediately prior to deliberations.

As of October 2011 the Court will not provide court reporters in civil matters. The parties may if they wish arrange for a court reporter at the party's expense; all transcripts remain the property of the Court.

3. *Exhibits & Witnesses*

Witness exclusion orders include a bar on reading prior witnesses' trial testimony.

See LRSF 6.8 (exhibits and witness lists). If counsel seek to display any exhibit which requires time or equipment to observe, such as slides, transparencies, film, and the like, counsel must make the exhibit available to opposing counsel for review prior to the court session in which it is proposed. Required equipment must be set up in advance. No proposed exhibit, chart or other item may be shown to the jury without agreement from all parties or Court approval.

Words spoken on video or audio tapes played for the jury will not be recorded by the court reporter unless counsel specifically so requests and provides a transcript of the recorded statements in advance to all parties and the Court.

Counsel are expected to stipulate to the admissibility or at least authenticity of exhibits, if reasonable. Stipulations should be reduced to writing or placed on the record. Do not ask other counsel for a stipulation on any subject in front of the jury.

Prior to trial, copies of exhibits must be (1) pre-marked and (except for those withheld for impeachment) (2) provided to the Court and other counsel. Generally plaintiffs use numbers, and defendants use letters, to designate exhibits. Counsel may agree to any other numbering system. If possible the parties should use the same numbering system in depositions and trial, so that there is e.g., a single "exhibit 2" in the case. Counsel should refer to the exhibit number when using an exhibit during questioning. Pre-marking an exhibit means using color coded Tabbies® stickers (or equivalent) with the exhibit number and case number written on each sticker. Counsel must provide the clerk with a Word format version of the exhibit list.

4. *Matters Before the Jury*

Consideration of the jury's time is essential. Counsel must advise the Court prior to the commencement of trial, or as soon as the issue is apparent, of any legal or evidentiary matters that counsel anticipate may require extended time for consideration or hearing outside the presence of the jury. Sidebar conferences are discouraged, and counsel should request conferences with the Court during recesses. Sidebar and in-chambers conferences (including for cause challenges during voir dire) will not be on the record unless requested by counsel; counsel may request the results of such conferences, and any additional matter such as argument, to be placed on the record after the jury has been released for the day.

5. *Documents*

See LRSF 6.8 (joint statement re trial time limits; witness lists and time estimates). Not later than 9:00 a.m. the date the trial is scheduled to begin, counsel must deliver to the clerk and opposing counsel (1) any trial brief; (2) a proposed jury verdict form with the caption of the case; and (3) an exhibit list.

Unless otherwise ordered for an earlier time, each party must also by then lodge with the clerk original deposition transcripts to be used at trial (other than for impeachment) and deliver to opposing counsel written specifications of the pages and lines proposed to be read into the record. When reading deposition extracts into the record, state "question" before each question and "answer" before each response, to allow an accurate record to be made. *See* LRSF 6.2 (deposition extracts).

Video depositions to be used at trial (aside from impeachment) must be treated as follows. The proponent must fourteen calendar days prior to trial provide to the other parties a listing of the portions to be used. Counter designations are due seven days prior to trial. Disputes are to be presented to the Court the first day of trial.

6. *Courtroom movement*

Without seeking permission counsel may approach a witness, for the minimum time necessary, to hand an exhibit or direct the witness' attention to an item. Witnesses who use an exhibit board or make other demonstration should be asked to return to the witness stand as soon as practicable.

7. *Jury instructions, special verdict forms & questions*

See LRSF 6.4 (jury instructions). Counsel should normally propose the latest version of CACI instructions. The Court normally (1) preinstructs the jury including with these CACI instructions: 100, 101, 102, 104 (if apposite), 105, 106, and 107, and (2) instructs at the conclusion of the case with these CACI instructions: 5000, 5002, 5003, 5006, 5009, 5010, 5012 (or variant if a general verdict form is used). Parties must nonetheless formally request every instruction desired. The Court instructs the jury *prior* to counsel's closing argument.

Counsel must promptly meet and confer on proposed jury instructions and special verdict forms.

The Court generally permits jurors to submit written questions, which are then passed on to counsel for their use as they wish.

8. Email. All filings should include on the first page counsel's email addresses. The Court's email address is dept608@sftc.org. *This may be used solely by invitation*, and nothing sent to this address will be filed. Typically the address is used for proposed orders and courtesy copies of filings including jury instructions. Proposed orders, special verdict forms, and jury instructions should be provide in Word format (or .rtf format if Word is not available). Everything sent to the Court's email address must be copied to all parties. No courtesy copies may be emailed to the Court until the original has been filed.

Superior Court of California
County of San Francisco
Department 304 - Judge Curtis E.A. Karnow
Complex Litigation - Users' Manual

These notes are designed to assist counsel efficiently to pursue their cases in this complex litigation department.

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A General Approach

Counsel should be open to serious modifications to the usual procedures. In complex, we tailor procedures to the case. The main job in complex is to simplify.

Case management conferences

- The early case management conference statements should focus on the topics set out in the DESKBOOK ON THE MANAGEMENT OF COMPLEX CIVIL LITIGATION §§ 2.21, 2.30 (2012 Lexis/Nexis).
- Joint statements are due at least 4 court days in advance. As with anything you want the judge to read, on the date of filing provide a courtesy paper version directly to this Department.
- Information to be included in the statement:
    - what has been done in the case,
    - where we should go with it,
    - what counsel wants the court to do,
    - and how best to move the case along.
- In the CMC statements, please resist the urge to argue motions and the merits.

Motion Practice

- Call the Department's clerks to get a hearing date for the motion: 415.551.3729. To avoid the risk of further delay, clear the date with other counsel.
- If you can, set the hearing a week after the last paper is due, and memorialize your briefing schedule with other counsel. It is in your interest to provide adequate time for the court's consideration of your papers.
- Include proposed orders with your submission.
- Do not file "sur-replies" and other papers not contemplated by the rules of court.
- For class certification and summary judgment/summary adjudication, endeavor to set the hearing 10 court days after last paper is due.
- One set of paper courtesy copies must be delivered to this Department the day the paper is filed.
    - Lexis/Nexis ("File & Serve Express") may not deliver items the day you try to e-file; and may take up to 24 hours to do so.

- E-filing: See local rule 2.10: e-filing in complex cases. Because of staffing shortages, there may be a substantial delay between the time an item is e-filed and the time it is available in the court's system.
    - Many law firms make mistakes when e-filing, resulting in rejected papers. The firm may not realize a paper has been rejected for days. For essential information, see the "Complex Civil Litigation" page on the court's website, click on the "Special Instructions for Electronic Filing" link and then to the "Resource Center". This presents the local rule and "Special Instructions" (a 14-page guide with detailed information on e-filing procedures).
    - Click on the "Education & Training" link to get dates/times of upcoming webinars and register for them.
    - Call File & Serve's Client Support at (888) 529-7587.
- Court call. Schedule this and tell the clerks about this at least 3 court days in advance.
- Court reporters. Counsel provide reporters, if desired. It is *strongly* recommended that counsel do so, as this may be the only complete record of actions taken at the hearing or conference.
- Do not assume that motions for oversized briefs will be granted. Never ask for that on the day a brief is due. The usual ex parte procedures are used to secure permission for an increase in page limits.

Discovery

Parties should generally consider sequencing discovery, with each phase designed to either lead directly to a motion or provide efficacies for the next phase. In some cases it will be more efficient not to sequence.

The goal for parties and the court is to avoid frustrating and expensive discovery motion practice. To this end:

- Agree, if at all possible, and avoid motions. The dark secret is that counsel are far better suited than a judge to know what the parties *really* need and what the burdens of production *really* are.
- The court imposes discovery fee shifting 'sanctions' when permitted do so. Include in your papers the admissible evidence needed to award fees in your favor, unless you agree the other side had at least a substantial justification for its position (even if erroneous).
- Before you resort to motion practice, it is strongly suggested you have an informal conference with the judge. This will save you and your client substantial time and money. Here's how it works:
    - Don't schedule the conference until you have done everything possible to narrow the issue. Letters alone often won't do it; pick up the phone to talk. Better yet, meet in person.
    - Agree in writing to toll the time for making motions, to enable the conference.

    - Two court days in advance, send in a non-argumentative 1-2 pp. letter/memo, not to be filed (copied to all parties, of course). Have enough detail so that your time is not wasted at the conference while the judge reads materials.
    - Be in the courtroom, in person.
    - The conferences are not hearings, they are not recorded, and nothing binds parties or the judge. You can't quote anything anyone says in e.g., a later motion.
        - As an exception, the parties may in writing make an enforceable agreement at the conference. C.C.P. § 2016.030.
    - The usual time for these conferences is 4 p.m.: call the clerks to get a date.
    - If a party still wants to file a motion after an informal conference, it may do so.
- Do not argue burden without admissible evidence of it.
- Do not employ boilerplate objections. The same undiscriminating language in response after response is a red flag. Generally objections should be made only when they are the basis for actually withholding extant items or responses. Some lawyers routinely respond with boilerplate objections with an eye towards providing substantive responses only after some meet and confer. This is usually done for purposes of delay and if so is, alone, discovery abuse.
- Consider a discovery referee especially in construction defect cases.
- If you use a referee:
    - The referee files a recommendation. The court then allows a week for a written request for *de novo* hearing (the parties can agree otherwise), and if that occurs the parties supply the papers to the court. Without that request the referee's recommendation may without more become the order of the court.
    - Unless you have a general policy of following the referee's order, you're wasting your time to hire one.
- Consider highly selective use of interrogatories. This discovery technique has limited utility, and tends to result in an inordinate number of motions.
- ESI disputes
    - For motions or informal conferences (in addition to counsel) use a person such as an IT professional who is personally familiar with the issues (e.g., search terms, exactly what the search steps are, how encryption is handled, where data is stored, which data formats and systems are in play, or costs of reviewing archival data, etc.).
    - Have a look at the N.D. Cal.'s new (January 2013) Guidelines for the Discovery of Electronically Stored Information. <http://www.cand.uscourts.gov/eDiscoveryGuidelines>

- Consider numbering documents once, good for all uses at deposition, motions and trial.

Class actions

Typically, considerable discovery cost savings are available with this procedure:

1- Plaintiffs do only the discovery they need to meet their certification needs. This is usually brief, as plaintiffs' counsel typically have what they need before the suit is filed. No discovery is taken at this stage regarding anticipated defenses to the certification motion. Then plaintiffs serve the certification motion.
2- Defendants undertake discovery they need to defend against the motion, if any, and then file the Opposition.
3- Plaintiffs then do the discovery they need, if any, to respond to the Opposition, and then file the Reply.

In this way, the filed papers define the scope of discovery. The court holds a short case management conference roughly a week after each filing to set the bounds of then pertinent discovery (absent agreement among the parties). The parties are free to suggest departures from this or any other proceeding outlined here.

Issues of manageability often include detail as to how trial would as a practical matter proceed.

Objections are often made to evidence submitted in connection with certification motions. See below, comments on objections in the context of summary judgment motions.

Have a look at the checklists & guidelines provided by the Superior Court in Los Angeles. <http://www.lasuperiorcourt.org/civil/UI/ToolsForLitigators2.aspx>

Demurrers

- Forget demurrers if you can, unless they may affect scope of discovery (or, of course, dispose of the case). You can file a motion for judgment on the pleadings later.
- The parties will save time and money if a defending party first shows the draft demurrer to the other side and invites the other party to file a new complaint addressing as many of the issues as they think may have merit. Then we can have a demurrer, focusing on the best draft the plaintiff (or cross-complainant) can muster.

Summary judgment & adjudication

- Summary judgment/adjudication can be difficult and costly. Consider alternatives and modifications.
    - A central benefit of litigating in a complex department is the flexibility of having early resolution of key issues via a stipulated bench trial. This provides substantial efficiencies. Consider severing issues (or bifurcation) for bench trial (with or without some stipulated facts). In these contexts counsel can still raise the legal issues which would otherwise be handled in a summary judgment motion, but if there is indeed a fact issue, the court can resolve it.

    - Requests for admission: the other side may simply have to admit your contentions.
    - Early motions *in limine.*
    - Expedited jury trials [C.C.P. § 630.01].
    - Recall, *any* issue can be resolved with C.C.P. § 437c(s).
    - Consider stipulations to reduce the notice period for the motion.
- Consider not making summary judgment/adjudication motions when it won't really advance the case. For example, sometimes seeking to have resolved abstract issues of duty, or affirmative defenses, is a waste of time.
- Evidentiary objections. A few suggestions to ensure the judge is spending his limited time thinking about the merits of your papers, as opposed to the minutiae of myriad pointless objections:
    - Make only objections which are essential. Consider making only the objection you'd make at trial: that is, usually only one, and normally only when the objection is very important.
    - Avoid shotgun "blunderbuss" objections.
    - Explain the objection if not obvious.
    - "[W]e encourage parties to raise only meritorious objections to items of evidence that are legitimately in dispute and pertinent to the disposition of the summary judgment motion. In other words, litigants should focus on the objections that really count. Otherwise, they may face informal reprimands or formal sanctions for engaging in abusive practices." *Reid v. Google, Inc.*, 50 Cal. 4th 512 (2010).

Sealing

Applications and motions for sealing often inject delays. These applications are routinely and reflexively filed without concern whether the materials really must be sealed. These applications are often unnecessary. Consider this: if the court does not actually need to consider the secret data, you can file a redacted version of the exhibit in the public file, without more.

A few guidelines (recall the rules do not apply to discovery motions):

- The application must strictly follow the procedures set out in the California Rules of Court. This is the law; the rest (below) is commentary.
- Seek only the bare minimum redaction - a word, a number, for example. Sealing entire documents or indeed whole pages is generally not justified.
- A separate motion/application is required.
- The agreement of the parties, including a stipulation or stipulated protective order, does not control the decision to seal.
- Have a backup plan for when the court rejects your application to seal.
- In addition to the items which must be filed in connection with an application to seal, it is very helpful to lodge a "delta" document:
    - Deliver to the court (and serve other parties), but do not file, a document which is the original showing the redactions with strikeouts, so the judge can see in a single

document what you wish redacted, without having to compare two documents or unseal envelopes.

- Mark the delta document 'highly confidential' or other equivalent term.

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