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Be Reasonable. Do it My Way: Notes For a Civil Jury Trial Pretrial Conference

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Honorable Curtis E.A. Karnow[†]

Introduction

As my father used to say, only sometimes without irony, "be reasonable: do it my way." Judges with extensive trial experience—and by the nature of their work, they very likely have much more trial experience than the lawyers—have ways they like to do things; these ways are, *but of course*, reasonable.

Trial judges have enormous discretion on how they conduct a jury trial.[1] To be sure, they have to give jury instructions consistent with the law (at least if someone objects), afford a reasonable opportunity for cross examination, pick a jury consistent with the code of civil procedure, and so on, but the details of the trial are left to the judge. Every judge is confident that her approach is state of the art, but the truth is that there are as many different approaches as there are courtrooms. Lawyers should do everything they can to know the judge's predilections.

The issues usually come up at the pretrial, or "trial readiness" conference. The judge may have a checklist of issues, but the list may not include all the matters which lawyers should be interested in.

To help focus those pretrial discussions and ensure everything is done to make the trial go smoothly and without delay (see Rule One below), I provide a list of issues to be addressed before the jury panel shows up in the courtroom. In most cases, only some of these will be worth much time, but you never know which ones those are in any given case. From my perspective, you will be shocked to learn, the best approach is to do things the way the judge wants. The second-best approach is to know

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[†] Judge of the Superior Court (San Francisco). I thank my fellow teachers and our attendees at the judges' civil orientation courses for many of the ideas in this Article.

[1] *See* Herron v. S. Pac. Co., 283 U.S. 91, 95 (1931) (stating "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct.").

what the judge wants, and ask her to do it differently for stated reasons, and to do this before the crisis is reached during trial.

And the secret really is to handle most issues before the jury panel arrives. If you are fortunate to have a judge assigned to the case long before the trial date, many of these issues can be handled months in advance of trial, which makes trial preparation so, so much easier. The judge's resolution of some issues, such as the admissibility of an expert opinion, or whether some other key witness will testify, may have a profound effect on a lawyer's trial strategy (and perhaps his settlement posture), and should be resolved as early as possible. Sometimes, an early jury instruction conference, and the judge's decision on the applicable law, is all the parties need to settle; or it might suggest thinking about a very different set of facts to prove at trial.

If you are not the person who can make decisions, compromises, and stipulations on the issues discussed below, then you are not trial counsel. Get trial counsel to do the pretrial conference. Please.

Three Rules

I suggest there are three general rules. The first two are common to all trials, and the last is specific to civil trials.

Rule One: Judges see themselves as protectors of the jury. Judges really, really care about wasting the jury's time. As a result, judges want uninterrupted testimony, short (or no) side bars, clear and plain jury instructions, terse objections during trial, easy-to-follow special verdict forms, and so on. This Rule also encourages judges to hear arguments and decide issues before the jury is sworn. Help the judge do that.

Rule Two: LOFWAP. This is the Law of Fewer Words and Pages. When possible, eliminate every unneeded word, page, exhibit, or other paper. Swamping the judge with paper increases the odds that important issues, an essential argument, or a crucial piece of evidence will be missed; put another way, that the signal will be lost in the noise. Sure, you need to make a record and you need to give the court context. But, to coin a phrase, be judicious. For example, when sending in transcripts, ask your judge if he wants the whole deposition or just the pages at issue, perhaps with a few surrounding pages for context. Only file important motions in limine. Keep them short. Make only key objections. Many of the suggestions discussed below are based on LOFWAP.

Rule Three: With a few exceptions, the parties can stipulate to anything in a civil case.[2] You can have a three person jury. Agree hearsay is admissible. Admit documents without foundation. Forgo attorney questions at voir dire. Forget live witnesses. Trash the claims in the complaint and have a trial on totally different causes of action.[3] The parties can agree that for purposes of the trial, a year has 340 days, and a day has twenty hours. This Rule has two effects. First, it puts a real premium on making a record of objections, and timely presenting your arguments to the court because otherwise you may be held to have agreed, or waived, some issues. The best time is not in the heat of battle; again, it is before the jury is sworn. Second, this Rule allows the lawyers and the judge to tailor procedures to the case—instead of the other way around. So, be bold. Have you ever met a procedure that you thought was a waste of time and money, and distracted the judge or the jury from what really needed to be decided in a specific case? This is your opportunity to change it. The other side, if asked nicely, might actually agree to your suggested change.

Issues for Pretrial Consideration

Disqualification & Disclosures

Judges will first usually announce any decisions regarding disqualification, or required disclosures, on the record. Some grounds for disqualification can be waived; the judge may or may not try politely to let the parties know they can waive those grounds. Some judges will not say a thing on this. If your judge is disqualified, figure out immediately if you still want that judge to try your case. If so, talk to the other side, and if you are all in agreement, tell the judge you want to waive (if you can; some grounds are not waivable).[4] If any party does not want to waive, do not embarrass the judge by telling the judge who that is. Just

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[2] I thank my colleague Judge Emile Elias (Superior Court, Los Angeles) (ret.) for remarking this. There are a few exceptions. Parties cannot just stipulate to: the trial date; sealing or closing the court room; moving hearing dates; extending the time for a motion for a new trial; a confusing or inconsistent special verdict form; the terms of settlement (or indeed dismissal) of a class action or derivative action. Probably among other things.

[3] This is called amending the complaint.

[4] *See* CANONS OF JUDICIAL ETHICS CANON 3(C)-(D).

state for example that the parties are not in agreement, and move on to the next judge assigned. If you do waive, do not mess it up: among other things, it has to be in writing, signed by the parties, and expressly waive the specific grounds at issue.[5] If you get this wrong the case may have to be re-tried when the losing party complains after the verdict. (It will.)

General Issues

Many judges will tell you that among their highest priorities is juror convenience. See Rule One. So legal issues should, if at all possible, be handled before or after the jury is present. Some judges will tell you they reserve a certain time—for example, 8:30 a.m. or 4:30 p.m.—for such meetings. In other cases you might have to alert the judge and other parties of the need for such a meeting.

Many issues are actually specified by law. You do not need the judge to tell you this, because you already know it. (Right?)[6] Although all jurisdictions may follow some variation, lawyers should know the local rules.

But still. The judge might have different timetables for the filings of some of these items, or modifications on the procedures. Find out.

Time Estimates & Limits

The judge is likely, after consulting with the lawyers and reviewing witness lists, to set time limits. Many judges use chess clocks to enforce them. The limits might be per witnesses, or more commonly, for all trial time—that is, for all questions on direct and cross, and opening and closing statements. Some judges will set separate time limits for opening and closing or for voir dire. Again, find out before trial.

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[5] *Id.* CANON 3(D).

[6]For example, these issues are handled by local rules in the Superior Court in San Francisco: courtesy copies, rules 2.7 (b); 2.11 (T); continuances, rule 6.0; in limine motions, rule 6.2; use of deposition extracts, rule 6.3, witness and exhibit lists, rule 6.4, jury instructions, rule 6.5, trial time limits, rule 6.8. The California Code of Civil Procedure (CCP) and the California Rules of Court (CRC) also have key provisions you have mastered: alternates, CCP 233, 234; voir dire, CCP 222.5; challenges, CCP 225-229; notebooks for jurors, CRC 2.1032; breastfeeding jurors, CRC 2.1006; hardships, CRC 2.1008 and CCP 204; opening statements, CCP 222.5, jury instructions, CRC 2.1055 and CCP 607a; peremptory challenges, CCP 231, polling the jury, CCP 618; questionnaires, Standard Jud. Admin. 3.25 and CCP 222.5.

Jury Trial Right

What are the causes of action, and which of them have a right to a trial by jury? Will the parties waive the right to a jury? Make sure you have spoken to your client about this in advance; the judge needs to know as soon as possible what the jury's role will be; and if in the end there is not going to be a jury, the trial preparation will take a profoundly different turn. Late attempts to secure a jury, or to waive one, often cause serious headaches for one party or the other. Judges get grumpy.

If some claims are triable only to the court, how will that work? Perhaps the evidence will be presented simultaneously, with the court writing up an order after the jury is bid a fond farewell. Perhaps the trial will be bifurcated, with either the bench trial going first (that is often the default in state courts) or the jury trial first (default in federal court), with the strong possibility of findings of fact by the first fact finder binding on the second one. Think about this especially if there is a contract dispute: does the contract need interpretation? Must extrinsic evidence be considered? Who should do that; the judge or jury? When?

Will there be an expedited jury trial (EJT) under California Code of Civil Procedure § 630.02?[7] Although these laws were designed for smaller cases, they can be just the ticket for bifurcated trials on specific issues such as statutes of limitations, waiver, and so on. If the case can be presented in about a day or two, look at this statutory schema. And you do not have to reject the EJT rules because you are afraid of losing the right to appeal on various grounds, or you want to be able to appeal to the court of appeals as opposed to the appellate division of the superior court. Arrange the stipulation the way you want it (remember Rule Three) and see if the judge will agree. The judge probably will.

Did you post the jury fees? The failure to do so can be treated as a waiver of the right to a jury. Are you ready to post the fees every day? Do you know how?

Media Coverage

Do you know anything about media interest in the case? Tell the judge. Find out if the judge wants your input on requests to have cameras

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[7] CAL. CIV. PROC. CODE § 630.02 (West 2011).

in the courtroom, and if you do have strong views, ask the judge to consider them. You might discuss options such as a pool camera (one camera feeding a variety of media companies) and ground rules such as no photos of jurors or certain witnesses. What should the judge tell the jury about media coverage? Is this a case in which security precautions for the jury should be made, such as entering and leaving the courtroom from a secure hallway?

Claims and Issues

Does the judge have a copy of the operative complaint and cross complaints? You should make it clear exactly what relief you are asking for, if it is anything other than a money judgment. Every lawyer must be able to tell the judge which of the claims and affirmatives defenses she is really going to pursue, with evidence, at trial. Be frank. Cut to the chase. Be serious, focus honestly on what is going to get tried. Tell the judge exactly which parties are in the case; and which have dropped out. Have the judge dismiss the "Doe" and "Roe" parties. Expressly and on the record now get rid of all causes of action and affirmative defenses that will not be tried.

Trial Scheduling

Find out if the judge has any dark days or periods, such as Friday afternoons when perhaps she has her law and motion calendar. Do you know if there are court holidays during your expected trial time? Make sure you know your witnesses' availability, and those of your trial team, so that you can tell the judge if you have insuperable scheduling problems during the trial. Given the judge's schedule, including breaks (when does she take breaks?) exactly how many hours of in-court time will you probably have each day? It is less than you think.

Phases

Do you have any requests for severance, bifurcation, or consolidation? The judge and your opposite number need to know this as soon as possible. The pretrial conference may be really too late, although, if it is your first contact with the trial judge, then presumably that is the time

to bring it up. Try to get the other side to agree to the request here, because briefing this issue can eat up valuable pretrial time. If you are proposing a contested phasing of some sort, be ready to explain how, from a purely practical point of view, it makes sense. You might want phasing or bifurcation for a special defense such as a statute of limitations, or as a function of bad faith settlement issues, severing some claim or party (perhaps a defendant is in bankruptcy?) or for some other reason.

Motions in Limine

There are motions in limine. There are *always* motions in limine. A state trial judge would be stunned if there were no motions in limine. But have you met and conferred on them? The worst thing you can do is dump fifty of these motions on the judge, if you only need the judge's full attention on two critical ones. Forget motions made just to sensitize the judge to an issue; put that discussion in the trial brief. Be, as they say, judicious. There are a lot of dumb motions, such as requests to exclude all inadmissible evidence, or all hearsay, and so on.[8]

Some of the issues, such as getting forty-eight hours' advance notice of witnesses, showing exhibits to the other side before using them in opening, and so on, may be in the judge's courtroom rules or, in any event, something you should be able to work out with the other side. It is a waste of time to make them the subject of a motion. Some of these motions perhaps can wait for a ruling until something happens at trial, but make sure you tell the judge. If you think a motion needs a hearing devoted to it, for example an Rule § 402 hearing on the admissibility of an expert, ensure the judge knows your thoughts on the matter. Know the difference between an animation and a simulation and inform the other side of your intent to use a simulation in court. Objections made for the first time as a witness is about to make the demonstration in front of the jury do not work out well. For either side.

Witnesses

You have provided the court with a witness list; you indicated the topics, the expected time on direct, and you arranged the list in the order

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[8] *See generally* Curtis E.A. Karnow, *A Vaguely Jocular Guide to In Limine Motions*, https://works.bepress.com/curtis_karnow/17 (Sept. 13, 2010).

the witnesses will be called. You noted which witnesses are testifying by way of deposition, and if so whether it will be via video, or read out in the courtroom. This is excellent. The judge probably used witness lists to set time limits for the trial; perhaps overall time limits, perhaps time limits excluding voir dire, or excluding voir dire as well as opening and closing. The time to argue with the judge about time limits is right now, because once they are set, the jury will be hard-shipped with those limits in mind, the court will probably time you (with a chess clock) down to the minute, and unless something very, very surprising, shocking and unforeseen happens (and that is a lot of adjectives), you will not get more time. Be careful.

Let the judge know if you expect any privilege issues: anyone who might invoke the Fifth Amendment, or a work product, attorney client or other privilege. The judge may want to set aside a hearing on these before the jury is sworn or at least outside the presence of the jury. If someone might have an interest protected by the Fifth Amendment, does he have a lawyer? It will make things so much easier if he does, and there might be a major interruption in the trial if he does not have one and wants one, or should have one.

Going over your witness list, the judge might wonder if you have overlapping witnesses or folks with cumulative testimony. Be prepared to explain to the judge why you need all these people, especially with experts, because few judges will allow more than one expert per topic. Ask yourself the following questions: Did I make sure all these witnesses are ready, willing and able to testify? Do they know where the courthouse is, and will they be on time? Being on time means actually getting to the courtroom early, bringing a book or newspaper, and reading it for hours while waiting to be called. Are they prepared for this? Regardless, this is much better than not having your next witness ready to go, because the judge might deem you to have rested, and move on to the other side or turn the case over to the jury. You did subpoena all third-party witnesses, yes? If not, and the witness does not show, it is very unlikely the court will cut you much slack. Let the judge and the other side know of any possible problems with witness unavailability.

How about interpreters? How many do you need? Figure this out long in advance and get them, because in a civil case, the court will not help. Sometimes interpreters are needed for the witness *and* for a party. In some instances, the language at issue is so rare that more than one

interpreter is needed: one to translate into a language used by a second interpreter to make the final translation. Double your time estimate, at least, for examination if you need an interpreter for a witness.

Does a party or witness have any special needs? Are they perhaps hard of hearing or need wheelchair access? Let the judge know. Courts have facilities that can help. All requests under the ADA (Americans with Disabilities Act)[9] should be made as soon as you know of the issue. The court probably has special forms to fill out, and for some issues it can take many days to make arrangements.

Depositions, Before Trial

If you plan to use depositions at trial, the jury really, really hopes you videotaped the session and will not try to read the testimony into the record with a pretend witness in the witness box. (It can get pretty tedious.) And if you do plan on using the video, you need to know in advance of trial which portions will be admissible, and that probably means getting the deposition extracts and objections to the judge before the jury is selected. This also means getting them to the other side first, so they can counter-designate and so you can object to their counter-designations. So when will this process start? Surely not on the day of trial. For one thing, the judge will not have time to go through the stack of depositions after the jury is selected. So discuss with the judge the timetable for designations, counter-designations, and objections, and the timing of when the judge is likely to get the rulings to the lawyers, so that the lawyers then have the time to edit their video clips. With a lot of parties, this process can actually take *months*.

By the way, when you made your objections, you did not make boilerplate objections to everything, did you? You treated them as you would at trial: only objections on one ground, maybe two, and only to material testimony, only when it matters. Right? Remember *Rule Two*: LOFWAP. Here are a series of not-very-good objections to deposition designations: (1) foundation objections can be difficult to sustain, for how is the judge to know? The foundation might be in some other part of the deposition, or in some other deposition or other evidence. (2) Relevancy

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[9] *See* 42 U.S.C. § 12101 (2018).

objections are often overruled unless it is painfully obvious that the testimony is pointless, because even innocuous questions like "did you meet with your lawyer before today's session?," or where a negative response is provided to "have you seen this document before?" can be part of a legitimate trial strategy. Especially when judges have issued time limits, they might feel that if a party wants to use up its precious time with seemingly marginal materials, that is its call. (3) Objections that a question calls for speculation are for the same reasons often overruled because the answer, "I don't know" might be just the point. And if the answer is substantive then it may be obvious the question *did not* call for speculation. (4) Objecting that a question "assumes facts" is also usually not useful, because the facts might come in at trial from someplace else, and anyway the objector almost never tells the judge *which* facts are being assumed. More tips are provided in the appendix to this Article.

Let me provide a frequently seen, and useless, approach. The objections are legion: say, hearsay, speculation, foundation, asks for expert opinion, and others. And the text objected to is, say, pages 145-165 of the deposition. In this case, there is *absolutely no way* the judge can tell which objection goes with which text. What will the judge likely do? Just move on and overrule everything. Here is what to do instead: match one objection to one slice of text. On the page, write "hearsay as to 145:3-6; speculation as to 145:6-9," and so on.

One last thing: ask your judge how she would like to receive the deposition extracts, perhaps via electronic versions on a USB key? Both paper and electronic versions? Does she want the whole transcript when there are only a few objections? (Remember LOFWAP.) Perhaps just the pages needed to read the materials and understand the context? Did you look at the paper courtesy copy of the deposition transcripts with the highlighted materials *before* it was delivered to the judge? The courtesy copy is the only copy the judge will look at. If you did, you would have noticed the dark blue or red highlighting actually obliterates the text: it is now illegible without a 100,000-watt neon lamp and a magnifying glass. Thanks a lot.

Judges are unlikely to tell the court reporter to transcribe video depositions as they are shown during trial; but a printed transcript can be used for the record. (Mark it as an exhibit.) And having that transcript for all parties and each juror is a very, very good idea. Finally, check

with either the judge or her clerk to make sure the necessary equipment works, and which day can be used to set up the courtroom. The judge is likely to tell the parties that only one set of equipment will be used by all parties.

Depositions, at Trial

Talk to the judge about lodging the original. Unless there is a serious issue about the copy you are using, she may not care. Make sure you have copies of the deposition pages for all parties and the judge. Figure out if your judge has any predilections about how to handle depositions at trial. If it is alright with the judge, endeavor to agree with your opposite number that the court reporter need not take down the words but rather use the transcript as an exhibit, with the specific questions and answers carefully delineated. This way the record is clear on what was read. When you read the transcripts, please, *please*, say "Question" and "Answer" so we know which speaker is meant to be imitated, and never correct the transcript unless the court has approved the correction (for a typographical error, for example); and do not ever interpolate, or explain anything, as you read the deposition. Do not play around with it at all. When you are impeaching (or quoting a party opponent), state what you propose to read by page and line number; if no objection, you may proceed to read. Usually you do not need any further foundation.

By the way, you did hire a court reporter for the trial, right? Most courts do not provide them, and without them, you do not have a record. And without a record, you may not have an appeal.[10]

Experts

Most judges have a particular way they handle voir dire of experts and ruling on admissibility in front of the jury; they do not want to be seen as blessing or endorsing any party's expert. So they may tell you never to ask for a ruling that the expert can testify over objection in front of the jury; or they may have some magic phrase, such as "she may testify" to

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[10] *See* Foust v. San Jose Constr. Co., 129 Cal. Rptr. 3d 421, 422 (Cal. Ct. App. 2011).

indicate that objections to the expert testifying are overruled. Find out from the judge if you can just roll right into your substantive questions on opinion after establishing qualifications and competence, or whether you need to formally make the witness available for voir dire by the other side. Discuss with the court and your opposite number if there should be a separate hearing, perhaps before the jury is even picked, to determine the admissibility of the experts' opinions.[11]

Stipulations

The judge will press you for a variety of stipulations and you will wearily indicate that you are, of course, open to these but that you do not expect much help from the other side. And maybe you really do not. The process of negotiating stipulations often seems daunting, and one thinks it is simply easier to put on one's evidence at trial and that this approach might even take less time than dealing with the nasty lawyer on the other side. This may be true. But consider the advantages of stipulations. First, they avoid the chance disaster at trial. A witness does not say the right thing, or goes missing, or you forget to ask a question in the heat of battle, and the evidence is not in the record, or the document is not admitted. You never know what might slip between your fingers. And second, stipulations really do save time. They also help focus the jury. Let us exaggerate for sake of emphasis: imagine a three-day trial with two days devoted to authentication of business records. Not a good situation. The jury will wonder, reasonably, why the lawyers dragged them through that swamp, and may not attend when the testimony turns to the truly disputed issues. They will not like you.

Most basic facts can be stipulated too; and all sides will benefit. (Rule Three.) Agree on the authenticity of exhibits, even their admissibility, if you can. For authenticity, you might agree that all documents produced by the parties, at least, are authentic, or are business records. Or both. When the basic qualifications of the experts are not in serious dispute, stipulate to their qualifications. Again: keep your powder dry for what really matters—the *material disagreements.* Agree to the court reporters; agree to split costs; agree a court reporter is not needed for voir dire (it will speed up the process, make your communications with the panel

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[11] CAL. EVID. CODE § 402.

more natural, and the judge will always let you make a record of any disagreements on the record later). Agree on the projector and other in-court technology to be used. Trials are exhausting enough without having pointless fights.

The Pretrial Evidence Hearing

Some cases have lots of documents, and these trials risk boring the juries to death with examinations designed to establish the admissibility of the documents: interminable questions on business records and practices, who sent something, and arguments on the extent to which a document is presented for the truth of one of its statements. Time is also spent considering the extent to which the exhibits should consist of only some of the pages, and on associated redaction issues. The jury wonders why the parties could not have worked all this out before the trial started. A good question: why not? The parties should try to agree on the admissibility of every document, perhaps reserving some relevancy issues. Where there is no stipulation, the parties could present at a pretrial hearing live witnesses (or, if there is time to prepare in advance, and with the parties' agreement, via declaration) sufficient to support admissibility findings. This works if only a few witnesses are needed to handle the bulk of the disagreements, or if the parties submit on the papers. Some issues must simply be handled during the trial. But with this pretrial procedure, the lawyers know in advance which documents are admissible, and the jury can focus on the merits of the case.

Voir Dire

How does the judge pick a jury? Every judge is convinced his method is the best and everyone does it differently. Some of the issues here relate to the way the judge always handles cases; some will be peculiar to your case, so know the difference and do not be afraid to suggest modifications to the judge's defaults if the case calls for it. One issue specific to the case is the size of the venire. Help the judge out on this. If there has been a lot of pretrial publicity, or the parties are well known (either in a good or bad way), or there are likely to be many sides and therefore a lot of peremptory challenges needed, or the case will go on for a long time you may need a larger than normal panel.

How does the judge pick a jury? How many panelists are seated in the first wave? Does the judge replace every panelist who is removed with a new person, or does she wait until a group is removed and then bring in a second group? When and how are cause challenges handled?

Will the parties agree to a smaller jury? You can, you know. How about an eight-person jury, with a verdict given by six? Will the parties agree now that if, say, the jury dips below twelve, the trial can go on? (Would you really rather retry the whole case? Really?) How about an agreement that if necessary, a verdict can be rendered by say eight out of eleven jurors, or seven out ten? Make the agreement now, on the record, because later during deliberations, it will be too late, and one side may fervently want a new trial.

Will you agree to pick the jury and alternates at the same time? It is a good idea. Let us say three alternates are to be picked. The parties then pick a fifteen-person jury. Maybe some jurors are lost during the trial, as is usual. Just before the bailiff is sworn to take the jury out for deliberations, the judge picks at random enough alternates to leave twelve people—those picked are then treated as regular alternates and the rest go to deliberate. During the trial, there are no second-class citizens, no one who thinks he is just there as a possible replacement. Everyone has an equal chance to be a deliberating juror. It keeps them attentive.

Will you use a jury questionnaire? Maybe not. Maybe it is a waste of time, because it takes at least a day to get the questionnaires back and review them. Maybe it is great idea, because there are privacy issues, or other issues where you suspect people might be less than candid in open court. Or jury selection will likely take at least two days anyways, so what the heck. Confer with the other side on this and try to come up with something that is very, very short—it should be almost painless for the panel to fill out. Do not just use the questionnaire you used last time, be prepared to justify every single question to the judge. And make the questions entirely unambiguous, because if there is any way, at all, that anyone can possibly, conceivably, misunderstand a question, then they will. They really will. And for each question, provide all the relevant options; remember, often the real answer is "I don't know."

Do you have questions you want the judge to ask in voir dire? Give the judge the list. Often this is a good way to escape uncomfortable issues, so that you and your client are not for example, thought of as having been too defensive about an issue. You can always follow up during your questions if you want to.

Many judges now allow mini-openings; some require it. Embrace this; it is one more opportunity to connect with the panel. The time you have will likely be limited to just a few minutes. You may be timed down to the second, so get this right. Do not be argumentative: the point is just to introduce yourself, and maybe your client, and to let the panel know what the case is about, and why they are being asked the questions. It takes the place of the usual neutral statement of the case, and makes it more personal, and more interesting. Judges like this because these mini-openings often reduce the stress level for the venire, which has no idea what they might be called on to decide, and in practice this seems to reduce the number of hardship requests. So, most of the time, these mini-opening are done right after the judge welcomes the panel and before hardships are considered.

Work with the judge to decide, with the other parties, the order of questions as among the parties. Usually it will be the same order throughout the trial, from voir dire questions to closing. Will you waive a court reporter for jury selection? As I note above, it speeds things up, and gives a more natural feel to the process. Of course you lose the exact words of a prospective juror, so weigh the factors.

How will hardships be handled? To what extent are counsel consulted on these? Some judges involve the lawyers when panelists say they cannot speak English. Often lawyers have little to no role with hardships, and indeed in some courts, hardships are handled by the jury commissioner's office.

You might also inquire if there are questions the court never wants lawyers to ask. For example, I discourage: "Maybe this isn't the best case for you?" and "Could you award $[dollar amount]?" and "Is there anyone who doesn't want to be here?" Furthermore, you may be asked to avoid questions that are just meant to ingratiate oneself with the panel, such as asking if they are comfortable, using questions to convey information to the panel as opposed to securing it from the panel, making comments that are only designed to create rapport (these never work anyway, for example, "hey how about them Giants?") or questions that probe personal issues which are not related to the case.

If there *are* personal issues that might need examination, and they are not touched on in the questionnaire, find out how the judge would like to handle them. Perhaps at sidebar? In chambers, with or without a court reporter? How cumbersome will that be? No case is free from some of

these issues because a variety of juror biases based on race, gender, ethnicity, and so on, matter in every case. Judges will want to explore those, probably with some privacy for the panelist.

Find out how challenges for cause will be handled. Usually this is done in open court, but I have seen some judges do it in chambers. At least with the agreement of the parties, cause and peremptory challenges might be handled in chambers, and then an entire group of jurors can be released at once. This is most efficient, and does not provide a clue as to what led to an effective cause challenge. This in turn, may reduce bad faith responses in the rest of the voir dire.

Does the judge have any time limits for voir dire? How flexible is she on this? California rules require the court to adjust voir dire time limits to the specific case, so be ready to explain why you think you should get a certain amount of time.[12] And be deeply conscious that, if the judge thinks you are wasting time, asking dumb questions, or trying to bias the jury, you will likely be cut off and are very unlikely to secure more time if it turns out you think you need it.

Discuss peremptory challenges. How many challenges will each party get? Will you cooperate with other parties on your side to exercise a set number or do you need the judge to allocate? How many sides are there? Do you have your argument down as to which group of parties are, or are not, to be treated as a "side"? To speed up jury selection and to use a smaller panel, will you stipulate to a fewer number of challenges than allowed by code?[13]

Use of Social Media

Will you secretly research the panel? Will you engage panelists on Facebook? Will you read their tweets? Although there is American Bar Association guidance on these issues[14] most courts have no rules. Discuss it with your judge, because the area is an ethical minefield. The default

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[12] CAL. CIV. PROC. CODE § 222.5(b)(2) (West 2019).

[13] *See generally* CAL. CIV. PROC. CODE § 231(c) (West 2019) ("In civil cases, each party shall be entitled to six peremptory challenges.").

[14] *See generally* Peter Geraghty, *Ethics Tip*, AMERICAN BAR ASS'N (June 9, 2017), https://www.americanbar.org/groups/professional_responsibility/services/ethicssearch/ethicstipfebruary2017.

rules are probably these: you can passively read communications sent to the general public, but you cannot actively instigate contact with panelists. There are good arguments that your on-line discoveries are work product, but there are good reasons to disclose to opposing parties and the court information which suggests (1) some party would have a reasonable cause challenge or (2) a panelist is not telling the truth. Think of it this way: If you win and it all comes out afterwards, what are the odds that your verdict will be set aside?

Finally, some judges work out a signal with which they can convey that no further questions are needed to toss a panelist. For example, when the person is patently disqualified and it would be a waste of time for anyone to try to rehabilitate him, "Counsel, that will be adequate," or something equally innocuous can work well.

Juror Questions

Many judges let jurors ask questions in civil cases. Most judges have the jurors write questions on paper, which are collected after the parties have asked their question of a given witness. At sidebar, the judge goes over the questions with the lawyers and rules on objections and asks the remaining questions. The lawyers may then ask very brief follow up questions limited to the issues in the questions.

Exhibits

If you were good, you marked every exhibit in the case *once*, and you used the same number in every motion and every deposition, and you will use that same number at trial. Thus you will never have to explain that exhibit five to the Jones deposition is exhibit nineteen to the Miller deposition and is also trial exhibit 432. Or worse: it is also plaintiff's trial exhibit 432 and defense trial exhibit 903z. This way, when jurors watch the Miller video deposition and Miller is talking about exhibit thirty-two, it is exhibit thirty-two at trial too, and you will not waste time trying to keep all these numbers straight for the judge and jury.

Some judges want exhibits pre-marked, ready to go at trial. Some want them marked at trial as they are used. Find out what your judge likes. Always have enough copies for everyone. Who is everyone? Certainly the judge and counsel. (The witness always gets the original.

Mark copies so it is obvious that they are copies—which takes some thought when exquisitely accurate color copies can be made.) Perhaps the judge will let you hand out copies to the jury; especially for an important item, be ready with these extra copies.

Some lawyers present the judge with three-ring binders full of exhibits—perhaps a series of them, five feet of them. Some of these are just too unwieldy. A three- or five-inch binder may be heavy and too cumbersome. This is true both for the witnesses and the judge. Some witnesses will spend a long, long, long time searching for a binder among the twenty at her side, lifting it to her witness stand, spraining her back muscles, and hunting for the document. Do not put her through this. Use one- to two-inch binders, or be ready to spring into action with a copy (ask the judge first if you can approach).

Some lawyers arrange the exhibits by witnesses, handing up copies of the specific exhibits to be used on a witness-by-witness basis. This usually works well, although when an exhibit is used with many witnesses it is hard for the judge to take notes on one copy. Discuss this with your judge, and suggest the method you think will make the judge's life easier.

Remember never to use an exhibit in opening unless you have the agreement of the other side, or of the court.

Will you use technology to display exhibits? Who provides it, and who will operate it? When, exactly, will the courtroom be available to set things up? You rehearsed the use of the technology, right? With exactly the same data, exactly the same software, exactly the same hardware, exactly the same cables, and exactly the same operators as you will use in court. Right? Did you see that when you did this, no one more than five feet away can read a darned thing? Did you recall that the judge will be about twenty-five feet away? And please God, you are not going to just stand there and read the PowerPoint to the judge or the jury, are you?

By the way, *the technology will fail.* Be ready with an alternative, poster boards, simple copies of things, dispensing with the display altogether; whatever you decide.

Very few lawyers consider notebooks for the jury. Maybe it is just too much to handle on top of everything else that needs to be done for trial. But these can be terrific in helping the jury keep track of things. They might contain, for example, copies of the preliminary jury instruc-

tions, key exhibits, a glossary, neutral looking photos of witnesses, fact sheets with names of lawyers and parties, perhaps stipulations, a blank exhibit list, and other items that do not favor one side or the other. Propose first to your opposing number, and then to the judge, the items to be included, and figure out who hands these (a lawyer, the judge? maybe the clerk?) to the jurors, and when.

Do any documents need to be translated? There are actually rules on this,[15] and there are sad stories from the court of appeal finding inadmissible translations not done by certified translators. Get an agreement from the other side on your translations, or get the issue to the judge in sufficient time to fix any problems before you desperately need to introduce the document.

How does the court handle confidential documents? This is a nasty problem, because courts are open to the public, and all evidence is presumed available to public inspection. This is not just a nicety; it is a matter of *constitutional dimension*, required by, for example, the First Amendment.[16] The odds that the judge will close the courtroom are almost zero; so think about options. Here are a few ideas. First, the jury may not need to see the secret stuff: just redact it from the document, explain to the judge and jury why you did so, and introduce it that way. Social Security numbers, bank account numbers, and other identifying financial data are almost never needed. Redact irrelevant medical diagnoses. Second, ask your client—is the stuff really a secret? Will serious harm truly result if it is in the public record? The truth is that often nobody really cares; there is no competitor lurking in the hallways ready to pounce on the information, and clients' fears of the consequences of disclosure are groundless. Find out whether you really need to go to the mat for this. If you do, consider two versions of the document, as you would when sealing in the context of a law and motion matter: the unredacted original, a copy of which might be passed out to the jury during questions and then taken back after the witness leaves the stand; and a redacted version that can be used as a placeholder and, for example, kept in the jury notebook, or displayed. Still, because the record will have to include the unredacted version (if you insist on using it at all),

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[15] *E.g.*, CAL. EVID. CODE § 753 (West 2019).

[16] U.S. CONST. amend. I.

you may have to make a motion to seal. Where there are thousands of pages subject to such a motion, it may need to be filed months before jury selection.

But think about voluminous documents. Really think about this. Jurors have little patience for a lot of paper. Walking witnesses through hundreds of pages is boring, and if you do not do that, do you think the jury will go through boxes of documents in the jury room? Do you, really? Recall LOFWAP. To be sure, trial lawyers are worried not just about the trial, but also the appeal, they want to "make their record." That is fine, but try to come up with alternatives to introducing twenty bankers' boxes of documents. The best option, of course, is a stipulation to the ultimate facts—for example, the documents show this or that fact. And think about stipulating to federal rule of evidence 1006, which is such a useful, obvious tool that I reproduce it here in its glorious entirety:

> Rule 1006. Summaries to Prove Content. The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.[17]

It is simple: prepare the short summary, give it to the other side in advance of trial, ask them to stipulate to Rule 1006, and tell them *exactly* which documents the summary relates to, and if they think the summary is inaccurate they can have the judge rule on accuracy, preferably before the jury is selected, so you know which exhibits you will have to bring, and the judge has a chance to review and rule on objections to the summary.

Settlement

Almost all cases settle; you owe it to your client to try. By the time you actually get to the trial courtroom, you may think it is hopeless. You might be right, but keep an open mind. Would you like a last shot? In many master calendar courtrooms, the assigning judge will send some

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[17] FED. R. EVID. 1006.

or all cases waiting for an available courtroom out for a settlement conference; be ready to give it a shot. Even if this does not happen, consider your options. Do you want the trial judge to try to settle the case? This may be feasible in a jury case, and less likely to work if it is a bench trial (some judges will not try to settle bench trials). If your trial judge is not the best bet, she might be able to send you to a judicial colleague who can try to settle the case—perhaps as the trial judge is perusing your few, targeted, essential, short and sweet and to-the-point motions in limine.

Jury Instructions

Find out if the court has a preference, or cares, whether the instructions come from CACI or another source. The parties should confer in advance on jury instructions and present clearly identified disagreements to the judge. Do not just submit variations without being able to state exactly why your version is necessary (is there not an approved CACI instruction on the issue?) and the other side's version is wrong; because most of the time, the variations are pointless. Try to agree on a few substantive instructions to be read to the jury just before evidence commences, either before or perhaps just after opening statements. These would outline the basic elements of the central claims and affirmative defenses. This will go far in helping the jury understand what to look for in the evidence as it is being presented. This is as opposed to being told only at the *end* of the case what they should have been looking for all along.

When proposing special instructions, not only try to get the law right, but also do everything you can to write it in plain English, with as few terms as possible that need further definitions. No legalese, unless there is a necessary term of art, but even then you will have to define it in plain English, so consider bypassing the term and just using plain English. The instruction should address an issue of fact which the jury must decide, which usually is a disputed issue of fact (if not disputed, the jury can simply be instructed the fact is true). Try to arrange instructions in the same order as the corresponding issue in the special verdict form. Be as short as reasonably possible.

See if the judge would like all the proposed instructions in an editable format on a USB device. This can be especially useful when, under the press of the impending close of testimony, the lawyers and judge huddle

in chambers to make last minute edits. Recall the instructions are due *before* trial starts.

And a word on overly aggressive proposed instructions. Some lawyers think pushing for highly favorable wording, even if not an entirely fair reflection of the law, is a good idea because there is nothing much to lose, and the judge will (at worst) simply pare the instructions down to something a bit less aggressive, modeled on presumably the lawyer's other experience in court where she asked for the moon and settled for whatever she could get. But proposing jury instructions is not a bargaining opportunity. Never ask for more than a correct, neutral statement of the law, because the judge has no obligation to edit an erroneous or incomplete instruction. The judge will just reject it.[18]

Confer with your opposite number before trial in an effort to resolve instructions issues (and special verdict forms), because dealing with these issues during trial is a real headache. It can eat up your evenings and weekends when you are trying simultaneously to prepare for upcoming witnesses. And would you not like to know the law the judge will use *before* you try to address it with your evidence, instead of after the case is almost over and it is too late?

Special Verdict Form

Judgments get reversed when the special verdict form is wrong. And it can go so very, very wrong. Long verdict forms contain dozens of "go to" instructions, and one of them sends the reader to the wrong next question. A question is phrased so that some readers think it calls for a "Yes" and others for a "No." Essentially the same question is asked twice and so, you *know* this is exactly what will happen, the jury answers the questions in opposite ways. Damages are calculated and summed in inconsistent ways; damages are allocated to one cause of action (say, breach of contract) but you cannot tell if the same or an additional or different sum should be allocated to a related claim (for, say, quantum meruit). An answer to one question is inconsistent with the answer to another one: for example, the jury says there is no product defect based

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[18] *See generally* Green v. County of Riverside, 190 Cal. Rptr. 3d 693, 700 (Cal. Ct. App. 2015); Boeken v. Philip Morris Inc., 26 Cal. Rptr. 3d 638, 663 (Cal. Ct. App. 2005); Alvarez v. Felker Mfg. Co., 41 Cal. Rptr. 514, 522 (Cal. Ct. App. 1964).

on design, but finds there is a negligent design.[19] Or the verdict form just fails to list one of the ultimate facts needed to enter judgment (one way or the other) on a claim. A party proposes a verdict form from some other source, and changes it just a little, teeny, tiny way, enough to make it dead wrong. Remember buttered bread always falls butter side down: if a series of questions can be answered inconsistently, or questions possibly missed that need to be answered, that is what will happen.

If a special verdict is hopelessly ambiguous, the case gets reversed, and it does not even matter if there is no objection before the jury is discharged.[20]

The parties need to confer on this form, and have as many pairs of eyes review it before sending it on to the judge. Preferably, use a pair of eyes owned by a non-lawyer who knows nothing about the case, and see if she can get through the spaghetti code.

Is it best to have one form per cause of action, with damages for each listed on that page? If damages are awarded on one form per cause of action, will the judge add them all up or are some of them overlapping damages? Should you put a stipulation on this issue on the record? (Probably.) Do you want one form that takes the jury through each claim seriatim, with damages at the end of all those forms? Do you need to have questions to secure findings that will help resolve settlement offsets, special findings for California Code of Civil Procedure § 998,[21] to buttress a request for fees and costs in connection with a request for admission that was not admitted when it ought to have been, for insurance coverage issues, or indemnity?

Again, consider giving the proposed special verdict form to the judge on a USB device, so last minute changes can be made before the jury is sent to deliberate, or, God forbid, after they come back and it becomes obvious the form was wrong (but even that can be salvaged: if the jury has not been discharged, the judge can still send it back for further deliberations with the corrected form).

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[19] Lambert v. General Motors, 79 Cal. Rptr. 2d 657, 659 (Cal. Ct. App. 1998).

[20] *E.g.*, Zagami, Inc. v. James A. Crone, Inc., 74 Cal. Rptr. 3d 235, 239 (Cal. Ct. App. 2008).

[21] CAL. CIV. PROC. CODE § 998 (West 2019).

Courtroom Procedure

Get a copy of the judge's written courtroom procedures, if she has it. Some have outlines on: marking exhibits, hours in trial per day, approaching witnesses, arriving early daily for conferences, basic civility expectations, and so on. Judges will often require lawyers to be present on time (which should be understood), to exchange contact telephone numbers and email addresses to alert the parties (and the court) of, for example, unexpected witness problems. Find out if the judge has a preference on standing when addressing the judge or asking questions, about approaching the witnesses or other movements in court, when breaks are usually taken, and if there are expectations about, for example, only having one lawyer to conduct examination per witnesses. Increasingly, judges are encouraging real trial participation by junior (that is, less than ten years out of law school) lawyers, and with some advance notice will be perfectly happy to accommodate that by, for example, dividing examination between two lawyers when the areas are plainly distinct. Most judges will tell you to stay away from the jury box, refrain from "speaking" objections, to return to the podium or counsel table after you have given the witnesses a document, and never to ask for stipulations from the other side in front of the jury.

If the judge does not tell you, find out if there are side-bar preferences: some judges will not hold them, others have a rough time limit (I get nervous after about eight seconds) and then postpone the issues until the jury is on a break.

Final Thoughts

Juries are smart. The individuals may or may not be, but there is something different about the collective, and this is not just Pollyannaish naiveté. It takes jurors about two days to fully assess the lawyers, whether they are straightforward, trustworthy or playing games. Sometimes it takes them ten minutes, as was the case in a trial presided over by one of my colleagues when during voir dire a panelist developed such a negative reaction to a lawyer that the panelist had to be let go. (Lucky for that lawyer the panelist spoke up.) The point is, to misquote Lincoln, you cannot fool a jury most of the time. So the cartoon aggressive lawyer—fighting every fight, making every objection, refusing

every stipulation, deciding mostly on the basis of what makes the other guy's life most miserable—the jury picks that person out, quickly. Sure, some lawyers think trials are a blood sport. But here is the thing: juries do not see it that way. The panel has been told this is all about the merits, and the ones that actually end up on the jury believe it, and they usually trust the lawyers to do their part. If the lawyers break the trust, they lose the jury.

This trust or bond with the jury is, I suggest, a function of the relationship with the judge, who is understood to be the jury's defender and advisor (Rule One), the only other person in the room who has no axe to grind. The best lawyers move smoothly through the trial, and parlay an apparently silky calm relationship with the judge into a connection with the jury. So make it easy for the judge to see it your way, to decide in your favor. Be reasonable.

You know. Do it the judge's way.

Appendix

Tips on Trial Objections to Deposition Transcripts

Trial counsel should review the courtesy copy of the deposition transcripts with the highlighted materials *before* it is delivered to the judge. Often the use of dark colors highlighting the text, such as dark blue or red, actually obliterates the text.

- Foundation objections can be difficult to sustain, for generally the judge does not know if there is one: the foundation might be in some other part of the deposition, or in some other evidence.
- Relevancy objections are often overruled unless it is painfully obvious that the testimony is pointless, because even innocuous questions like "did you meet with your lawyer before today's session?," or where a negative response is provided to "have you seen this document before?" can be part of a legitimate trial strategy. Especially when judges have issued time limits, they might feel that if a party wants to use up its precious time with seemingly marginal materials, that is its call.
- All colloquy between counsel, including objections and arguments (much of which puts counsel in a poor light) should be deleted from designations.
- Objections to multiple pages—that is, to a wide variety of statements—are usually overruled unless all the statements are subject to the objection, which is rarely the case. When the objection is not valid as to every statement in all those pages, it is usually overruled.
- Multiple objections which apply to many pages do not allow the judge to figure the evidentiary issue with respect to any given statement. So these are generally overruled.
- It is a waste of time to object on the basis of, for example, "calls for a legal conclusion" when the witness responds that he does not know. (It is also of course pointless to designate the passage.)
- "Asked and answered" is not useful because it requires the judge to review an undetermined number of prior pages of the deposition (or perhaps other materials) to determine the validity of the objection.
- "Misstates record" is not useful, and generally cannot be ruled on, for the same reason.

- "Mischaracterizes" is a vague objection (what is being mischaracterized, and in what way, is usually not stated) and generally cannot be ruled on, for the same reason.
- "Compound," though occasionally useful at deposition and at trial, is not useful in this present context where the answer is evident, unless the *answer* is itself ambiguous as a result of the (assertedly) multiple questions (which is often not the case).
- "Calls for speculation" is an objection that can be useful at trial, but almost never makes sense in the present context because the answer will actually reveal whether the witness does in fact know the answer (in which case the objection is no good), or that she does not know, in which case the proponent is wasting his time to use it at trial (unless the fact of ignorance is material).
- "Vague and ambiguous" is generally useless in this context for the same reasons: although suitable at trial, it is not suitable after the answer has already been given unless there is something about the *answer* which is ambiguous.
- California Evidence Code § 352 issues are generally reserved for trial, because usually they require a weighing of relevance and prejudicial value, which in turn depends on the materiality of the topic and whether it has been or will be addressed at trial in some other way; thus the issues are (with some exceptions) difficult or impossible to handle at the pretrial stage.
- The objection "incomplete," without more, cannot be sustained, because it is not clear in what respect the answer or the question is "incomplete."
- The objection "facts not in evidence" (or "assumes facts") is rarely useful in this context because it is impossible pretrial to know if the "facts" at issue (themselves usually not clear from the objection) will be in evidence *by the time the designation is presented to the jury*. And usually the objector never tells the judge *which* facts are being assumed.
- "Not calculated to lead to admissible evidence" is a particularly pointless objection in this context. (Yes, I have seen it.)
- A very high number of designated pages may suggest that the designations were not made in the good faith expectation of reading them to the jury at trial, because there would be no time to do so. You can read up to about 150 words per minute. How long will it take you to read everything you have designated? How long will the video last?