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THINGS THAT WORK

By Justice John L. Segal

There are a lot of articles and programs about judges' "pet peeves." While it can be useful for lawyers to know judges' preferences, sometimes the pet-peeves programs make judges sound whiny and ungrateful. "I hate it when lawyers take too much time"; "It drives me crazy when attorneys won't answer my questions"; "No one ever reads my local, local rules." We are very fortunate to have the opportunity to serve as judges; complaining about it makes us look like we do not remember how fortunate we are. Also, I kind of like lawyers (I was one, you know). I respect what they do, and (through associations like the ABTL) have made lasting friendships with many lawyers.

So this article is not about pet peeves. It's not about "common mistakes on appeal," the "top 10 ways attorneys can forfeit an issue," or "do's and don'ts from the judicial perspective." I decided to write about things that, in my experience, litigators do well and that judges respond favorably to. In other words, things that work. These are some of those things.

Strategic concessions

In my view, few things are as powerful as an appropriate, strategic concession. You don't have to win every point on every issue to win a case. Few things are as refreshing and persuasive as when an advocate concedes what he or she must, so the attorneys and the court can focus on the issues that are genuinely contested and that need addressing and deciding. If a particular interpretation of a contractual provision really means you don't have a claim, concede the point, and argue why that interpretation is wrong (and yours is right). If a published decision from a different district or division compels an adverse result and is not distinguishable, acknowledge that fact, but argue why the decision was wrongly decided. If the court's hypothetical question goes too far, admit your argument would fail under that hypothetical, but explain how your case is different and why that is significant. These kinds of concessions not only gain credibility (judges tend to trust advocates who concede points when they should), they save time and breath that could be spent on more productive and impactful arguments.

I recognize not everyone agrees with making any, let alone strategic, concessions. But I have seen concessions, where appropriate and not prejudicial to the attorney's case, work many times in many contexts. In the right circumstances, concessions can be remarkably effective.

Civility as advocacy

Civility is more than a professional responsibility. (See *Masimo Corporation v. The Vanderpool Law Firm, Inc.* (2024) ___ Cal.App.5th ___, ___ [2024 WL 1926197, p. 4] ["Incivility slows things down, it costs people money—money they were counting on their lawyers to help them save."]; *Hansen v. Volkov* (2023) 96 Cal.App.5th 94, 107 [the California Civility Task Force has "warned that '[d]iscourtesy, hostility, intemperance, and other unprofessional conduct prolong litigation, making it more expensive for the litigants and the court system,'" quoting Beyond the Oath: Recommendations for Improving Civility, Initial Report of the California Civility Task Force (Sept. 2021) p. 2].) It is an advocacy tool. Juries, trial judges, and appellate judges all respond favorably to attorneys who are civil to court staff, opposing counsel, court reporters, law firm receptionists, and everyone else working in our legal system. Incorporate civility into your practice, and it will pay litigation dividends.

One trial lawyer I had several cases with once told me (at an ABTL dinner program and, yes, long after the trial was

over and all appeals exhausted) that he always tries to treat opposing counsel as a friend and colleague and, as important, makes sure the jury can see it. He said he wants the jury to think he is not trying to win the case by quarreling with opposing counsel on technical points or making objections that seem as though he is trying to keep the jury from hearing the truth. He wants the jury to know that all he needs to win is the evidence, which will support his case. Successful attorneys are civil because civility is a winning strategy. Everybody likes a civil lawyer; no one likes a jerk.

Answering questions

Judges ask questions for a lot of reasons: to clarify positions, to test arguments, to reveal concerns or weaknesses in an argument, to show they are paying attention, to ensure both sides feel the court is hearing and understanding their positions, or to consider the effect a particular decision may have on the law. I have asked questions for all these reasons.

Questions from the bench in the trial court (except during a jury trial) and on appeal are blessings. Do you ever wonder what on earth the judge is thinking? When you get a question, you know! But questions are also an invitation to engage, a request to exchange ideas, an opportunity to emphasize important points and correct misunderstandings. So . . . answer the question! Even if you think it's not a good question, and I have asked my share of bad ones, the one asking the question is the decisionmaker. I have heard many thorough, intelligent, and well-presented responses to questions that . . . do not answer the question. Countless times I have said something along the lines of, "Thank you, counsel, for your answer. I understand your argument. Now, let's go back to my question." If a question throws you off your prepared remarks, you'll find a way to get back to your outline if it's important to do so (and often it's best to abandon your outline), but for now . . . answer the question. That's always something that works.

Stating what the evidence isn't

Our Court of Appeal summer externs often ask me: what facts should I put in the Statement of Facts section of my memo or draft opinion? I answer: put in all the facts you need, and none of the ones you don't. The law students uniformly find this answer unsatisfying. But it's true: in your briefs and motion papers, you should include every fact from the deposition or trial testimony you need to make your argument, and leave out all the unnecessary or distracting ones.[1]

Most everyone can state the facts. But not everyone thinks to state some of the facts that aren't. I often find persuasive procedural and background summaries that state what facts are not in the record. Simple example: "The contracting party testified she signed the contract on May 2, 2023. She did not state that she had any discussions with the other side about the contract or that she was confused about any of its terms." Okay, good, now I know she's not going to be a source of any extrinsic evidence and I'm thinking, well, she seemed to understand the contract when she signed it. Or: "The company representative told the employee that, if he continued to come to work, the company would assume he agreed to the arbitration agreement, even if he did not sign it. There was no evidence the employee complained, objected, or said anything about the arbitration agreement during the next nine months he continued to work at the company." Good, now I know that we're going to be talking about an employee that the company claims agreed to arbitration by his conduct and that the employee has no evidence (at least from him) to show there was not an implied agreement. Stating the facts clearly and concisely is good legal writing. So is stating the non-facts.

Accepting the panel

Of jurors, not appellate judges. (But see Assembly Bill No. 2125 (2023-2024 Reg. Sess) [proposed legislation to amend Code of Civil Procedure section 170.6 to authorize an attorney or party to disqualify appellate justices for prejudice].) How great is it to announce, when the court

1 Dates are a good example of this: On May 1, 2023 this happened. On May 5, 2023 that happened. On June 3, 2023 plaintiff filed the original complaint. On July 5, 2023 plaintiff filed a first amended complaint. On September 6, 2023 the plaintiff filed the operative second amended complaint.* Keeping track of all the dates is mentally taxing and, unless the case involves the statute of limitations or the relation-back doctrine, unnecessary. So I try to include all dates I need and none of the ones I don't.

* Despite my intro, here's a pet peeve: "FAC" and "SAC." Also, note there is no comma after the years because they are prepositional phrases ("on" is the preposition).

asks for your first peremptory challenge, "Your Honor, ladies and gentlemen of the jury, the plaintiff/defendant accepts the panel as presently constituted!" You only have to do it once, at the beginning, and the jurors know you are so confident about your case and the evidence that you are happy with *any*[2] group of jurors (after cause challenges), including the ones currently in the box. It sends the signal: we trust you, ladies and gentlemen, just as you are, to do the right thing. Then, when opposing counsel starts exercising peremptory challenges, you can exercise yours with impunity: I was ready to accept the jurors we started with, but now that my has opponent has messed things up by questioning the jurors' ability to be fair and impartial, I have to respond. In my experience, that works.

Using verbs rather than nouns

I had never heard the term "nominalization" until a few years ago. (See *American Lung Assn. v. Environmental Protection Agency* (D.C. Cir. 2021) 985 F.3d 914, 948 [nominalization is "a 'result of forming a noun or noun phrase from a clause or a verb'"], reversed on a ground having nothing to do with nominalization in *West Virginia v. Environmental Protection Agency* (2022) 597 U.S. 697, 700; *In re Marriage of Phillips* (April 9, 2002, G027518) 2002 WL 524301, at p. *4, fn. 5 [nonpub. opn.][3] ["Ah, the power of nominalizations to obscure what is really going on."].) But I knew I preferred verbs to nouns.

Verbs move, excite, inspire. Nouns are slow, clunky, methodical, and don't go anywhere. So use verbs, not nouns. The ruling of the court was –> The court ruled. The court's weighing of the factors was erroneous –> The court erred in weighing the factors. The People alleged the defendant used a firearm in the commission of the offenses –> The People alleged the defendant used a firearm in committing the offenses (or, if you like commas, the People alleged that, in committing the offenses, the defendant used a firearm). The court denied the motion for a continuance of the trial –> The court denied the motion to continue the trial. Look for the "of"; it's a dead giveaway. Verbs work; nouns get in the way.

Making transitions

We have shown that strategically conceding when appropriate is a strength, that lawyers should answer questions from judges, and that verbs are better than nouns. We now show that, even if those suggestions are wrong, transitions like this paragraph are helpful in reminding the reader where we have been and where we are going.

These kinds of transitions, guideposts, summaries, or roadmaps work because they make it easier for the reader (usually, the judge) to follow what you have argued so far, understand what you are going to argue next, and show there are many ways for the court to rule in your favor. So: We have shown the statute of limitation bars the plaintiff's causes of action. We now show that, even if it does not, the court properly ruled plaintiff's causes of action are meritless. (Oh, and in the next section, we will show why any error by the trial court was harmless.)[4] These kinds of transitions also brim with confidence: Look, judge, our first argument is solid. But even if you don't think so, our second and third arguments are even better. We have so many ways to win, just pick one and rule in our favor.

These are some of the things that work for me.

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2 Okay, one more pet peeve: italics, bold, and underlining. On the other hand, footnotes don't bother me.

3 Not cited or relied on in an "action." (Cal. Rules of Court, rule 8.1115(a).)

4 One more thing. If you are working on an appeal, remember every appeal at some point involves three issues: (1) forfeiture (is the issue preserved), (2) merits (did the trial/district court err), and (3) prejudice (is the error harmless). Just so you know, that's what every appellate judge is thinking about.