

ABTL Judicial Interview Project Justice Edward Ferns

I. Background

Born in Scotland, his family emigrated from Scotland when Judge Ferns was 8-years-old. His parents believed that U.S. had better economic opportunities for their children. Judge Ferns attended UCLA undergrad, attended Southwestern Law School where he was active in the Legal Aid program. He joined the L.A. District Attorney's office after graduation and was D.A. from 1975 to 1989. As a D.A., Judge Ferns tried every kind of case including capital murder cases. His last position was head of the unit investigating and prosecuting crimes by sworn peace officers and elected officials. Judge Ferns was appointed to the Municipal Court by Governor George Deukmajian. He is married and has one son. He is an avid tennis player and occasionally plays golf.

As a judge serving in the criminal courthouse, he spent 3 years on the 9th floor presiding over special circumstances murder trials. As a judge in the civil court since 1997 he has presided over a range of cases in a general jurisdiction IC court. As of February 2013 he is sitting on assignment in the Court of Appeals; prior to that assignment he served as a mandatory settlement conference judge downtown.

II. Current Topics

For Judge Ferns, the most pressing issue facing the trial courts is funding. Budget cuts weigh heavily on the court and will adversely impact the ability of judges to get cases to trial as quickly as the parties would like.

III. New Cases

Judge Ferns sets a status conference when new cases are assigned to his courtroom.

IV. Status Conferences

Confirming service of the complaint is a priority for Judge Ferns at a status conference. There are a few good excuses for failing to serve a complaint; Judge Ferns likes to get cases to trial within a year of the filing date and the failure to serve a complaint makes this difficult. If the parties want to set a trial date beyond a year, Judge Ferns expects there to be a good reason. To prepare for a status conference Judge Ferns reads the complaint and the case management conference statement to obtain a preliminary understanding of the case.

For a final status conference, Judge Ferns requires compliance with the Local Rules of the Los Angeles Superior Court. He does not have any "local local" rules. Motions in Limine will be ruled on at the start of trial and before the jury is brought up. Judge Ferns believes that 80% of Motions in Limine are Evidence Code section 352 motions. Judge Ferns believes that the Kelly v. New West Federal Savings case should be read by every lawyer before they file Motions in Limine in his courtroom. Judge Ferns expects that the lawyers appearing at the FSC will be familiar enough with the case and will have the authority to work out joint jury instructions and a joint witness list if that hasn't been done.

V. Mediations/Arbitrations/References

While in a trial court, Judge Ferns was willing to hold Mandatory Settlement Conferences if the attorneys would agree. The timing of MSCs was a function of Judge Ferns' availability.

In terms of alternate dispute resolution, Judge Ferns would never order cases to arbitration or mediation. However, Judge Ferns would refer cases to mediation but would not set hearings or OSCs to ensure that mediation had taken place.

Judge Ferns will not appoint discovery referees in his cases in the absence of unusual circumstances. He expects lawyers to act like mature adults and if there is unremitting conflict between the lawyers in a case he will appoint a referee. If the discovery practice in a case is voluminous, Judge Ferns will consider the appointment of a discovery referee.

VI. Motion Practice

As a general observation, Judge Ferns is concerned about the training that young lawyers are receiving from their law firms. He has seen lawyers fighting tooth and nail over relatively minor matters, and then seen the senior lawyers on those same cases work out substantial issues over a cup of coffee. Judge Ferns wants lawyers to be more thoughtful about how judges like him will view their demeanor and approach in the context of the issue before the court.

Judge Ferns does not issue tentative rulings, but he does share his thoughts with the lawyers before listening to argument. He is frustrated when lawyers go over the same ground that is laid out in the moving and opposing papers; lawyers appearing in Judge Fern's department can be assured that he has read the papers, and if necessary, has reviewed the cases that have been cited.

Judge Ferns hears ex partes after his usual calendar; like in a restaurant "the people with reservations get seated first." It is very important that lawyers show that they have "good cause" to obtain an order shortening time; without such a showing no relief or order shortening time will be granted. Judge Ferns emphasized that it is never appropriate to apply ex parte for a hearing on a

motion to be relieved. The smart thing is to make a motion to continue trial and then move to be relieved.

Judge Ferns observed that when a lawyer prevails in law and motion the lawyer will describe him to have been decisive, and when the ruling is against the lawyer he will then be deemed as "pre-disposed" on the matter. Judge Ferns believes that lawyers should recognize the amount of time that judges have to read motions before filing a pile of out-of-state authorities with the court. A lawyer may well be better off honing his argument using California case law rather than filling his papers with out-of-state authorities.

Judge Ferns does not accept letter briefs and has not asked lawyers to submit them.

Scheduling hearings is simple in Judge Ferns' courtroom; call the clerk and reserve a date. If an MSC is desired, the same technique should be used.

Judge Ferns does not have pre-trial evidentiary hearings, but in the proper circumstances he will hold an Evidence Code Section 402 hearing. Motions in limine can be helpful, but Judge Ferns hopes that lawyers have read the Kelly v. New West Federal Savings case before they file in limine motions.

Motions for Summary Judgment are dispositive motions and Judge Ferns recognizes that California law has a preference for trial on the merits. Apart from certain types of MSJs (statute of limitations, failure to exhaust administrative relief, and certain professional negligence claims) Judge Ferns urges lawyers to consider whether a MSJ is going to end the case or whether it will embolden the opposition if it is denied.

VII. Discovery

Judge Ferns follows the Code of Civil Procedure and the California Rules of Court in setting and hearing discovery disputes. He does not accept phone calls as a means of resolving discovery disputes because the volume of motions is too heavy.

Judge Ferns is not inclined to use referees for discovery matters at the first instance. He will "bring everyone into the principal's office" if it is apparent that discovery disputes are out of hand.

Judge Ferns will not stay discovery for or until a "dispositive motion" has been heard.

VIII. Trials

Trials in Judge Ferns' courtroom go 5 days a week. In the morning, trial starts at 9:45 a.m. and goes until 12:00 with one 15 minute break. Afternoons start at 1:30 and go to 4:00 with a 15 minute break midway.

If there are multiple trials set on the same day, the first case up would be whatever case had been set by code as a preference case. If there is no preference case then the oldest case will start trial.

Judge Ferns will continue trials if there is good reason to do so. Although being engaged in trial constitutes good cause, any agreement by the lawyers win and of itself will not be good cause. Judge Ferns expects that lawyers will communicate with each other about trial scheduling and logistics, but he doesn't like to hear lawyers complaining about the opposing lawyer being engaged. Judge Ferns believes that everyone makes mistakes, and lawyers should get over things and move on.

Judge Ferns rarely sees cases in which bifurcation will serve judicial economy and efficiency, but he will always follow the law.

Judge Ferns does not have any rules regarding the media in his courtroom, but he would prefer to have cases tried in the courtroom and not in the press. Closing arguments are best in the courtroom.

Trial briefs are optional, but Judge Ferns believes that they are beneficial to judges. A good trial brief will contain a summary of the facts, the relevant case law, and will highlight the evidentiary issues that are presented by the motions in limine.

Judge Ferns utilizes the "6 pack" system of seating 18 jurors for questioning. He will ask initial questions to get jurors to talk, and Judge Ferns will ask the lawyers if there are questions that they want him to put to the panel.

Judge Ferns does not utilize mini-openings or questionnaires (although he did permit them in death penalty cases) in civil trials. He tried 40 to 50 cases as a District Attorney and has presided over 100 criminal cases and 80 odd civil cases, so he has a solid understanding of jury selection.

No time limit is imposed by Judge Ferns on jury selection; lawyers start on a long leash but it will become a short leash if the lawyers waste time. Judge Ferns will sustain his own objections to lawyers questions in voir dire, and is quick to clamp down on efforts to indoctrinate jurors.

Jury questioning of witnesses is not allowed by Judge Ferns, and if jurors write out questions he will share them with the lawyers. Post trial, Judge Ferns has

“no problem” with jurors being interviewed but tells jurors that they are not required to talk to the attorneys.

During a jury trial, lawyers making objections should state “objection” and the grounds for the objection; speaking objections are not welcome or permitted. In a bench trial, the lawyers can argue the ruling from counsel table. Judge Ferns does not believe that a multitude of side bars help move a trial along. So he discourages them. However, under some circumstances a side bar may be permitted before the court has ruled on an objection; the court may also defer the discussion to a time when the jury has been excused. Only the attorney responsible for questioning the witness may state objections.

Judge Ferns gives leeway and imposes no time limits for opening statements, but he will not permit an opening argument. If lawyers display a tendency for long-windedness, Judge Ferns may feel obligated to impose time limits. Judge Ferns noted that lawyers tend to forget that most television shows are broken up into short segments and usually last 30 minutes, and there is a reason for them being that length.

Lawyers can't split up the questioning of a witness whether on direct or cross; one lawyer has to handle each witness. Re-opening is permitted with witnesses but shouldn't become a habit. Lawyers are not allowed to hand exhibits to jurors. Judge Ferns supports technology in trial but is concerned that rather than keeping the jury engaged it consumes time and displays the technological shortcomings of the lawyers.

When a jury is deliberating, lawyers are expected to be immediately available by phone if not in person. If the jury has a question, Judge Ferns will call the lawyers and see if an answer to the question can be agreed upon. If not, Judge Ferns will let the lawyers argue, then rule on the proper response, and then give the jury that answer.

Judge Ferns served as a juror on a civil case when he was a district attorney and found it to be a fascinating experience. From his experience as a juror and as a judge, he believes that lawyers get hung up on little things – rather than focus on the big picture.

Post trial, Judge Ferns does not recall ever granting a judgment notwithstanding the verdict. He has granted a couple of non-suits, and his rulings in those cases were affirmed.

Bench trials are less formal affairs than jury trials for Judge Ferns, but he expects the lawyers to be prepared and on time. Staggered schedules can be utilized in bench trials; lawyers can remain seated when questioning witnesses or addressing the court. Opening statements are permitted, and he notes that 80% of the time in bench trials he asks the lawyers to submit their closing arguments

in writing. Declarations can be submitted if the lawyers stipulate to them and may take whatever form that the lawyers have agreed to. Lawyers don't need to submit proposed findings of facts and conclusions.

Judge Ferns emphasizes that he listens very carefully to witnesses and to lawyers; he says that he listens like someone who is trying the case. Using a power point in a bench trial before him does not have the same benefit that it may have in presenting a case to a jury.

Judge Ferns expects lawyers in a bench trial to exchange exhibits and whatever deposition testimony will be used well before trial starts.

IX. Conclusion

Judge Ferns recommends that lawyers talk to the other side about the issues in a case. He believes that and he urges lawyers to show everything that they plan to use as exhibits before trial.

Judge Ferns observes that the biggest mistake that lawyers make is making a case personal. In terms of arguing to the court, Judge Ferns says that the biggest mistake a lawyer makes is prefacing a statement with the phrase "with all due respect...."

Judge Ferns says that he cannot encourage lawyers too strongly to be professional in the best sense of the word, and treating everyone involved in a case with courtesy and respect is the best way to insure a good outcome.

While in college, Judge Ferns worked as a waiter. He worked with a variety of people, and waited on an equally diverse clientele. Like waiting tables, the law is a service and people oriented business. If more lawyers had worked as waiters, Judge Ferns thinks that there would be more civility and collegiality in the civil practice.