Mistakes Lawyers Make: Part I

ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

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Letter from the President

We are all cognizant of the existing court congestion and the lengthy delays in scheduling a matter for trial. There is presently pending before the State Legislature a bill which, if adopted, would provide some much needed relief. The bill (SB 1289) authorizes the appointment of 15 additional Superior Court judges for the County of Los Angeles. SB 1289, however, is conditioned upon the Board of Supervisors of the County of Los Angeles making a finding that there are funds available to pay the cost of such additional judges.

Marsha McLean-Utley

SB 1289 has passed the Assembly Judiciary Committee and its ultimate adoption appears to be solely dependent upon the Board of Supervisors enacting the required enabling resolution. Although the budget adopted by the Board of Supervisors includes the necessary funds, the Board of Supervisors has failed to pass the required resolution. It has been reported (*Daily Journal*, July 13, 1982) that the Board of Supervisors intends to extract certain proposed court reforms as a condition precedent to authorizing the

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Judge Hupp: Mistakes in Settlement Conferences

This article is by a somewhat jaundiced judge who spent six months last year observing counsel in settlement conferences. Many cases do not settle because competent counsel disagree on the merits of their respective clients' positions, or because factors outside the bounds of the merits inhibit settlement. Conversely, basic errors in negotiating technique often play a role in frustrating a settlement that was both in the reach of and in the apparent best interests of all parties. Since the assigned subject of this article places the emphasis on the negative, perhaps the article will not be as dull as an exposition of how to handle settlement conferences correctly.

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Judge Cole: Mistakes in Law and Discovery, Writs and Receivers

The assigned topic is inappropriate to the readership of this publication. Members of this association are accustomed to handling complex litigation and do not need this lecture. It is like the clergyman who scolds his congregation because other members of the church have stayed away from services. Nevertheless, in the hope that you will spread the word to others less prepared, let me review some of the recurring problems which never cease to amaze the judges who sit in the Law Departments.

I. Whether to Appear at All

It is remarkable to any judge who hears law and motion and discovery matters, even for a few months, how many firms routinely bring on for hearing unnecessary demurrers and motions, while other firms of equal calibre and engaged in the same types of practice rarely, if ever, initiate other than essential demurrers or motions. By "essential," I mean a demurrer which must result in the final termination of an action, or a motion for summary judgment to which there is no honest defense, or a motion to dismiss which stands a good chance of ending the action once and for all. These decisive procedures are entirely proper and worthwhile. In stark contrast are motions either made without any real hope of ultimate success or motions which do nothing but delay or cause an amended pleading

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Judge Saeta: Common Mistakes in the Courtroom

I had a few misgivings about writing this article. A litany of mistakes does not make very pleasant reading. Moreover, one judge's "mistake" is another judge's mandatory procedure. Advice that might be wonderful in one courtroom might be the kiss of death in another.

Nonetheless, I have plunged ahead, trying to cover my tracks by consulting with many other judges about their pet peeves and observations. While I am theoretically responsible for everything in this article, I will blame all errors of form and procedure on my anonymous colleagues!

Wheat Versus Chaff. Trial lawyers should try to focus attention on the main features of the case. There is a

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Judge Hupp

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Success as a litigator does not necessarily involve the same positive attributes as does success as a negotiator. Settlement technique, like litigating technique, does not come as naturally as breathing, as some lawyers clearly assume, but must be studied and learned.

So — accentuating the negative — here are ten easy ways to avoid success in settlement conferences:

1: Refuse to analyze your case and fail to set your goals before the conference.

This technique goes hand-in-glove with failing to prepare your case before trial, and brings about the same result. By not thinking about where the client should end up by way of settlement, you will have no idea of what demands and offers to make when called upon by the court. Of course, this invariably leads to making a demand or offer which is too high or too low to bring about a sensible settlement. The best way to get into this posture is to fail to analyze the strengths and weaknesses of the case, should trial actually be necessary. Analysis is clearly prevented if the lawyer does not know what his or her evidence or the opponent's evidence will be. However, even with preparation as to the facts, lack of analysis is still possible by assiduously ignoring what the facts portend for the case. For example, the effect of strong evidence supporting a cause of action or defense may be resisted by applying rigorously the technique of wishful thinking. This clearly will frustrate the settlement conference and transfer the job of analysis to the trier of fact. Another technique to avoid the unfortunate results of analysis of the case is to adopt the belief that established doctrines of law will not be applied because the "equities" of the case so much favor your client.

Hon. Harry L. Hupp

2: Puff the case to your client so that he or she expects to reach 110% result by settlement.

Failure to prepare the client is a sure road to an unsuccessful settlement conference. To apply this method properly, you must start early in the case to build the client's expectations of what can be accomplished. Tell the client that his case is a "sure shot" or a "slam dunk" and that you can get him not only large compensatory damages but "punies" as well. By maintaining this status into the settlement conference, you can guarantee disaster. This technique is aided by failing to keep the client advised during the preparation of the lawsuit, and by not discussing settlement until the day of the conference, so that the truth, when it comes, is met with incredulity, outrage, and a form of substitution of attorneys. Leave yourself no time to go over your recommendations and the reasons for them. Then your client can assume that you have sold out to the opposition, particularly if he or she hears about major problems in the case for the first time from the lawyer or, even better, from the judge.

3: Do not prepare a settlement conference statement.

Preparation of a careful settlement conference statement has a number of deleterious effects, including, at the extreme, settlement of the case. Failure to prepare a statement, for example, invariably leads to annoyance of the judge who then believes he has to remedy the defect by asking a number of pesky questions, such as what the case is all about. Much more important than the annoyance of the judge is the impression left on the opponent that you are both uninterested in properly preparing the case and unlikely to know how to go about it. The opponent may be tempted to believe that you will be equally unprepared at trial and therefore has nothing to fear. The result is often (usually?) an unsatisfactory offer or demand.

The desired impression can be enhanced by rummaging around in a briefcase while muttering "I know I've got it here someplace" when asked about special damages. The real coup in this endeavor, however, is for you to ask the opponent what your client said about a point in deposition. By careful use of these methods, the opponent will be led to believe that the lawyer could not litigate his way out of a paper bag, resulting in sufficient lack of credibility to reach a settlement.

4: Try the case in the settlement conference in an effort to convince a judge that you are right.

The essence of this technique is to ignore the opponent while attempting to convince the judge. Here, you must neglect the obvious: settlement does not take place until the opponent is convinced his client's best interests require it. Reserve all of your "good stuff" for the private conference with the judge, so that the opponent will hear none of it. Thus, if you really have something convincing, the opponent will never hear about it or moderate a position. Even if you are pushed into revealing a position in open conference, refuse to state what evidence backs up the position. In that way, the opponent cannot evaluate the position and therefore will disregard it. Variants of this approach may convince the settlement judge, who will not try the case, that you will win, but fail to impress the opponent. Frustration of a settlement is almost always achieved by telegraphing an opponent that his or her interests do not require settlement at your desired number.

5: Abuse the opponent and his client and ridicule his case.

If nothing else frustrates settlement, you can always fall back on pejorative adjectives. Innumerable ways of doing this can be tried. A careful and lucid explanation of how uncooperative the opponent has been in discovery will usually do the job of ruining any settlement atmosphere. Make the opponent sufficiently angry at an early stage of the conference and the lack of settlement goal is within reach. Even if the judge can get the subject of settlement discussed amidst the welter of flying charges and countercharges, everyone's sense of machismo is sufficiently aroused so that the goal of the conference becomes victory — which is guaranteed to kill a settlement. In discussing the merits of the opponent's case or position, no sentence should be without a "meritless," "frivolous," "absurd," "senseless," or even "stupid." Such an approach not only avoids analysis on your part but also detracts the opponent's attention from an appreciation of your case, greatly aiding the failure of settlement.

6: Make all settlement offers a demand for abject surrender.

If you have slipped on Step 1 (failure of analysis) and therefore know the approximate value of yours or the opponent's case, all is not yet lost. Settlement can still be frustrated by demanding at least 100% (150% is better) of what the victorious case would bring at trial. This is best achieved by obstinately refusing to see any merit to any of the opponent's positions. If you are too honest with yourself to do this, you must dissemble and pretend to do so. After all, recognizing any possible merit to any oppo-

nent's position leads to compromise and may actually result in settlement of the case. To avoid settlement, take your cue from history and demand unconditional surrender. In that way, principle can be vindicated and justice done if the client can stand the risk and the principal.

7: Make all offers and demands on a take-it or leave-it basis only.

By so doing, the wasting of endless time in settlement conferences can be prevented. If you and your client have carefully considered all of the odds and are willing to compromise, nevertheless settlement often may be avoided with this tried and true technique. The "skip the minuet and go straight to the bottom line" method avoids paying the slightest bit of attention to the psychology of settlement negotiations. If you fail to realize that the opponent will never believe that a settlement offer is "the last and final" offer, you can avoid many settlements which would otherwise frustrate the obtaining of litigation experience. After all, you and your client, having analyzed the case carefully, should not have to stoop to the demeaning level of a curio shop operator by actually bargaining.

Dignity surely forbids that a result carefully decided upon should be tested by an avaricious opponent. A haughty attitude and an arrogant bearing should be enough to frustrate settlement even if the number is right. The other party is expected to swallow any pride. The "take-it or leave-it" technique is best carried off by walking into the settlement conference with a cashier's check, placing it before the opponent, and departing. This will endear the lawyer to judge and opponent alike.

8: Resist the obvious.

Always deny even the plainest conclusions. Deny, for example, negligence in a case where the client with a load of .20, blows the stop sign at 50 mph in a 25 zone, and hits a little old lady in a crosswalk. (Of course no ABTL member would touch such a case, so the example is absurdly hypothetical.) This will delay the settlement conference for a half hour or so while the judge convinces you that your position lacks merit as a counter in the settlement discussion. Then, fall back on the next meritless point (i.e., the little old lady is contributorily negligent). All of the nonsense points will so delay the conference that "real" settlement negotiations never get underway and the settlement process is duly thwarted.

9: Focus on the trees; ignore the forest.

This is related to number 8. By endlessly dwelling on details the main picture can be avoided. If you don't know that the details are irrelevant, you can concentrate on them with all the more sincerity. Users of this approach often assume that the jury will not see the "big picture" either, and frequently appear in the green sheets.

10: Ignore the opponent's problems.

Ignoring the considerations of the opponent is related to Step 1 (failure of analysis). After all, are you supposed to be a mindreader? By making sure that you do not have a glimmer of the opponent's goals and objectives, settlement can often be avoided. Don't think of how the opponent may want to settle the case in a way that minimizes his exposure and you can avoid coming up with a solution which might do just that.

The moral of this story is that a lawyer well versed in the proper techniques can frustrate even the most tireless or tyrannical settlement judge now sitting in our courts. Such a lawyer can and will be a legend in his time — at least among the small circle of settlement judges.

—Harry L. Hupp
Judge of the Superior Court

Judge Saeta

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tendency by some counsel to accent the minutiae: asking for too many instructions; filing too much paper (there is no rule that every exhibit must positively go into the jury room); not stipulating beforehand to the bulk of the facts not seriously in dispute; spending an inordinate amount of time on peripheral issues, etc.

Lawyers should not underestimate the *collective* intelligence of the jurors. The jurors will probably look for the "big picture" (probably including some irrelevant matter) just as clients focus on the "big picture" rather than the narrow legal issue with which the lawyers and judges are fascinated. So, meet the jurors on their ground. Don't labor over every detail, exhibit, bit of testimony, witness; define the essence of the lawsuit and show how the evidence on your side preponderates. Counsel violate this rule when they try to depend upon one question or bit of impeachment rather than looking at the whole case. Maybe this is the "Perry Mason syndrome". Overly long argument is another clue to not separating the important from the unimportant. Argument should synthesize the facts and then expressly apply the law to those facts. A recapitulation of what each witness said does not perform the same job.

Instructions. Naturally, every judge complains that instructions are tardy in coming out of counsel's briefcase. I find it helpful to go over instructions with counsel before *voir dire* is commenced since I want to instruct on the main elements of the causes of action and defenses prior to opening statements. In this way the jury can get a picture of the law of the case before it hears the facts. So it is important to me that the jury instruction requests be filed with my clerk upon entering the courtroom. Many counsel are prepared for this; those who are not are making a mistake.

A recently developed and growing problem is the word-processing of BAJI instructions even though there are printed instructions available. The printed instructions do not require proof-reading; typed instructions do. It is also harder to see where BAJI instructions have been changed if the whole instruction is re-typed. Section 5 of the Standards of Judicial Administration recommended by the Judicial Council states that the parties should indicate by use of parentheses or other appropriate means the way in which a BAJI instruction is modified. This standard is not being followed and it causes unnecessary time-wasting to run down the source of material, determine what corrections or modifications have been made and proof-read the accuracy of the typed instruction against the printed copy.

I'm generally quite surprised at the length of time that attorneys will go over instructions with a judge, arguing small nuances and asking for every possible instruction that has some bearing on the case, then in argument not refer to the instructions or relate the facts to the instructions. Many judges send the written instructions into the

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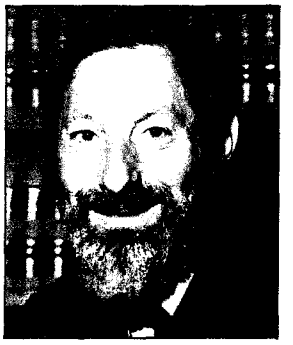
Next Issue: Mistakes Lawyers Make — Part II

This is the first of two issues of *ABTL Report* devoted to the subject "Mistakes Lawyers Make." The next issue, to be published in October, will feature an interview with Judges William M. Byrne, Jr. and Mariana R. Pfaelzer of the U.S. District Court and an article by attorney Edward M. Lynch, who assesses his colleagues' performance from the perspective of the jury box.

jury room for detailed consideration. Argument is an excellent time to relate the facts to the law through the use of instructions but this is seldom done.

Timeliness In Preparation. A good trial brief, filed upon entering the courtroom, is a plus. Counsel look bad when their opponent comes up with a trial brief and yours is missing. I think trial briefs have a tendency to be too long. There is too much fact and not enough law. It should not take more than a few paragraphs to lay out the boundaries of the factual dispute. I doubt if many judges are prejudiced by a fact-recitation. Obtaining the prejudice appears to be the aim of long factual summaries. There is some current effort by judges to adopt a rule that trial briefs may not exceed 15 pages in length. Given that viewpoint, careful counsel will try to keep it short as opposed to the 30 to 50 page trial "brief" that is commonly seen. I don't count copies of out-of-state and federal cases: they are really very helpful if the cases are crucial ones. Good judgment should dictate the number of copied cases.



Hon. Philip M. Saeta

One element of preparation that seems to be lacking in many cases is the pre-marking of exhibits. Because new trial-setting conference rules require this, trial judges will expect exhibits to be marked for identification prior to arrival in the trial courtroom. This saves quite a bit of time and leads to stipulations for the admissibility of evidence, which, in turn, make the trial flow more smoothly. Another element of preparation sometimes missing is the checking of the Evidence Code and secondary sources on crucial evidentiary questions that are going to arise during trial. Occasionally counsel will have a short trial brief or points and authorities on a key evidentiary question, but more often than not these evidentiary questions are unanticipated prior to arising in the course of trial. Advance consideration of the admissibility of each critical bit of evidence should be routine. Prior to trial, a conference of counsel for the marking of exhibits might smoke out sticky evidentiary points and thereby focus last-minute preparation.

Honored in the absence are well-prepared special verdict forms. These should be filed along with the jury instruction requests but often are not forthcoming from counsel. Special verdicts are very tricky in preparation and require the mind of a computer programmer. It probably would be helpful to try out a special verdict form on somebody else in the office to see whether or not the logic of the instructions holds up to the very end.

Interrogation. Short questions are super; long questions confuse the witness and bog down the examination. Many questions get too long because the questioner recites a lot of facts or the prior answers before getting to the point. One particularly annoying habit is the constant repeating of the last answer as a prelude to the current question. It doubles the record but not the fun of the trial. The technique of having cross-examination on every area of the direct examination is quite prevalent. If the direct examination has gone into an insignificant area, why shouldn't the cross-examiner leave it alone? I realize it is hard to abandon any area in the fear that it may be probative because it is marginally relevant, but counsel should know the case well enough to separate the important from the trivial. I do not think it is good cross-examination technique merely to adopt the format and chronology of the direct examination. Each lawyer wants to get something different from the witness; therefore the approach should be different. I believe leading questions are a mistake even if the opposing side does not object. I tend to discount such testimony and will so warn counsel in a court trial. It is the witness who is testifying, not the lawyer, and leading questions reverse the situation.

Exhibits. In a throwback to the surprise aspects of trial, counsel sometime procrastinate on marking exhibits even when the exhibit is neither a surprise to the opposing side nor much of an impeaching document. I think it is a mistake for counsel to announce that he cannot mark his exhibits until he sees what exhibits are marked by opposing counsel. That an exhibit is marked does not mean it has to be introduced into evidence. If an exhibit is not terribly probative, leave it alone and don't even refer to it in the testimony. It is improper to show a witness an exhibit that has not been shown to opposing counsel first. Pre-marking of exhibits should take care of this situation although I have seen counsel still ask to look at exhibits marked prior to the start of trial. Once the exhibit has been marked and all counsel have had an opportunity to look at it, the trial should not be delayed by looking at it again. Often counsel will not clearly identify what exhibit they are showing to the witness or, taking the other extreme, try to get the entire contents before the jury by giving a long-winded identification.

I think that charts are not used frequently enough in cases involving detailed chronologies of events or accountings. While jurors do make notes, often it is impossible for them to keep up with the numbers or crucial dates. Sometimes this is brought together by a well-prepared summation, but charts could be created that would tend to put testimony into better perspective.

Similarly, counsel should give jurors copies of crucial documents or parts thereof or use blow-ups of paragraphs of important contracts and leases. Otherwise it is difficult for jurors to follow the testimony. On occasion, counsel will give the trial judge but not the jury such aids, though the jury will decide the case. Usually each document has only a few significant clauses or provisions which the jurors would understand better if given a copy.

When there are depositions, the original or a copy would help the judge follow along even in a jury trial. The judge can assist the reporter in keeping the record straight as to the opening and closing segments of the deposition extract. Counsel should not make the common mistake of reading deposition testimony too fast; it is always easier to read than it is to formulate a question for a witness.

In a court trial, it is helpful to hand the exhibits to the judge after admission. Often counsel will take the exhibit back from the witness and put it on the counsel table or give it to the clerk even though the essence of the document is supposed to be convincing to the trial judge. I realize that some judges do not want to read the exhibits until the end of the trial, but I assume that there are others beside myself who have a preference for under-

Seminar Set for Santa Barbara

The Ninth Annual ABTL Seminar, entitled "Business Torts," will be held October 15, 16 and 17 at the Santa Barbara Biltmore. David S. White, Seminar Chairman, advises that enrollment is limited to 100 members and that reservations should be made promptly.

standing what is going on while testimony is being given rather than trying to reconstruct it during argument.

Some counsel have a tendency to try and read whole documents into evidence when only portions are crucial. This is probably the reverse of my prior suggestion of letting critical extracts be circulated among the jury rather than having the witness try to read these extracts. Photographs can be extremely helpful in illustrating the points, but often photographs are not clear or there are too many of them and they're not shown to the jury. Unless they are shown immediately to the jurors, how can they remember the significant areas pointed out by the witness or even remember what scene was being depicted? The witness could mark the photograph which would tend to focus the jurors' attention.

Objections to Objections. Much of the judge's time in trial is spent on ruling on objections. There are a lot of pet peeves in this area. One common mistake is to make speaking objections. By this I mean not only stating that a matter is irrelevant but explaining why it is irrelevant, stating the privilege and arguing why it is crucial to be upheld in this case, etc. Time and again judges have to tell lawyers to state merely the grounds of the objection and then to argue only when asked by the judge. Counsel continue to state that evidence is "immaterial" even though the courts have not had that objection since the Evidence Code was enacted. Many times counsel will object to leading an expert in the area of his expertise. This is permissible. And it is not a bad idea to make sure your expert "translates" his fancy terms into language the jury can understand. Another disfavored objection is "self-serving." In my view, everything offered by your opponent is self-serving but this does not make it excludable.

A bit of research on the difference between refreshing recollection and past recollection recorded would not hurt many counsel. Many lawyers do not know the difference nor realize who can offer the exhibit. Other judges report to me that counsel feel outraged when not allowed to let a witness testify to hearsay even though the witness is on the stand. Availability for cross-examination is not the *sine qua non* of admissibility. A last no-no is arguing with the judge after evidentiary rulings are made. Occasionally after critical rulings you can ask to approach the bench to argue, but this can get tedious and judges will often get tired of continual carping. A trial brief the next day on the point may produce some relief if this is argued out of the presence of the jury, but arguing in open court with the judge on evidentiary rulings should not make many points with anyone in the courtroom.

Mechanical Problems. Finally, I will focus on some miscellany, most of which deal with mechanical problems faced in trial. While most lawyers know that one should not go into the "well" even experienced lawyers sometimes do this without permission and fail to counsel their witnesses on invading this space. A lot of little do's and don't's can be learned by keeping up with the Civil Trials Manual, Civil Trials Benchbook and information sheets distributed in individual courtrooms. If the judge's poop sheet says that you do not have to ask to approach a witness, try to get out of the habit of asking. On the bright side, I've found that civil lawyers do a better job than criminal and family lawyers in getting to court on time and making estimates of the time it will take to try their matters.

One sin that civil lawyers do not always avoid is engaging in discussion on the record between themselves or showing bad blood. While trials are tense, a bit of courtesy really does help; the opposite really hurts. One courteous thing to do with one's colleagues is to cooperate in the scheduling of witnesses. A lawyer who consistently runs out of witnesses before the noon and afternoon recesses can run the risk of having his side of the case terminated prematurely. Many judges prefer that if time is being wasted, it be that of witnesses rather than the court's. An exception to this rule might be for the scheduling problems of expensive expert witnesses. I would think that most judges would go along with small breaks in trial time if the next witness is an expert who had a set time to appear. Consistent mis-scheduling is aggravating. Another waste of time that can be avoided is in the organization of exhibits for the examination of the current witness. Counsel should be aware of necessary exhibits and have them out and ready to go rather than searching through the exhibit box.

I hope that some of the above tips can be of assistance. Not all suggestions will work in every court, but there are not many judges who will object to advance preparation, knowledge of the Evidence Code, good manners and a short brief. The rest you can take with a grain of salt — that is, if you're appearing in courtrooms other than my own!

—Philip M. Saeta
Judge of the Superior Court

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515 South Flower Street
Forty-Fourth Floor
Los Angeles, California 90017
(213) 488-7000

Judge Cole

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to be filed. Even if a complaint is subject to general demurrer, there usually is little merit to making such a demurrer if the result is an amended pleading. Any experienced lawyer knows that when a nonessential demurrer or motion is made, the moving party runs the risk not only of educating the respondent but also of having the court by its comments further educate the other side.

Similarly, unless a complaint is so hopelessly garbled that it generally cannot be understood at all (usually, but unfortunately not always, such complaints are prepared by nonlawyer litigants representing themselves), the making of motions to strike is generally a futile practice.

Hon. John L. Cole

The court often finds it unnecessary to rule on such motions at all, particularly if accompanying demurrers are sustained. Especially useless is the tedious combing through a complaint — usually undertaken by intensely earnest and well-meaning but newly-admitted counsel who pounce with glee on every conclusionary term (i.e., wrongful, illegal, etc.) and righteously tell the court that conclusions are impermissible in pleadings. Of course they are, but find me any pleading without a conclusion. In the larger scheme of things, what difference does it make if conclusions remain in the complaint? (One exception where a motion to strike should be made: a valid attack on a claim for punitive damages which pleads only the mere statement that the conduct charged was taken to vex, annoy and harass the plaintiff, or that it was done maliciously, fraudulently and oppressively. Punitive damages not being a cause of action themselves, but merely an additional potential remedy, a demurrer for failure to state a cause of action is inappropriate, the motion to strike being proper.)

Finally, I touch on the discovery motion only in the next sentence, since discovery is a topic all unto itself: Everybody — court, counsel on all sides and their clients — is the loser when such motions are made.

Let me turn now to my dirty laundry list of procedural horrors:

II. Calendar Management Errors

A. Ignoring Applicable Statutes, Rules and Policy Memoranda

It is trite to suggest that before initiating a court proceeding counsel should be acquainted with the applicable statutes and rules; yet too often they are ignored. The statewide Judicial Council Rules govern many procedures, e.g., Rule 202, concerning demurrers, Rule 203, concerning notices of motion, and Rule 203.5, concerning motions to dismiss under the two-year statute, C.C.P. §583, subdivision (a). Counsel must comply with these rules, but failure to do so occurs daily, with consequent avoidable delay and expense.

The Rules of the Superior Court for this county provide for the distribution of business among its various districts. Within the Central District, Rule 304 provides in some detail for the assignment of business among the various rather highly specialized departments in that district. Noticing matters for hearing in the wrong department causes the court to order last-minute transfers. These often require a continuance so that the proper judge has the opportunity to prepare for the hearing.

Policy memoranda and manuals that deal with writs and receivers practice, law and motion practice and discovery practice should be consulted and followed as nearly as possible.

Random illustrations would include, in connection with discovery motions, a check to make sure that the 30-day provision of Rule 222, California Rules of Court has not been transgressed or that answers to interrogatories have been verifed by the parties, not by counsel (Discovery Manual §251 B). If leave is sought to file an amended pleading, counsel should be sure that it complies with Paragraph 1 C of the Law and Motion Policy Memorandum. A motion for withdrawal as counsel must comply with Paragraph 61 of that manual (at least a third, perhaps more, of such motions are sent back to the drawing board for failure so to comply).

B. Arguing Without Checking the Tentative Rulings

Tentative rulings by telephone are available in each of the law and discovery departments. Checking them may disclose technical deficiencies in proof of service, etc., so as to enable counsel to concede on the motion without appearing (tell the clerk by telephone, if that is the case). The tentative rulings given over the telephone are usually not the full ruling of the court. The clerk should be asked, prior to the calendar call, if there is a fuller tentative ruling available. If so, it should be consulted.

C. Assuming a Continuance Will Be Granted

The policy memoranda concerning law and motion, discovery and writs and receivers practice, as most recently amended, make it explicity clear that continuances must be arranged for by 4:30 p.m. of the *third* court day before the hearing. Counsel may have the first two continuances for the asking if they are arranged for by that time. Every effort must be made to advise the court clerk to that effect as promptly as possible. If the continuance agreed upon is for the hearing of an order to show cause re preliminary injunction and a temporary restraining order is outstanding, a written stipulation is required if the temporary restraining order is to stay in effect during the continuance period.

Requests for continuance made later than 4:30 p.m. of the third court day ahead of the hearing may very well not be granted (particularly not by the writer) in the absence of a genuine reason such as last-minute sickness. Especially likely to be denied are requests made on the morning of the hearing on the ground that counsel had agreed with each other the night before that a continuance would occur. The reason for this strict policy is that the court must necessarily prepare calendar matters in advance.

D. Expecting to Use Oral Testimony

Calendar demands do not generally permit oral testimony in the Law Departments. Such testimony is, of course, totally inappropriate in most all law and motion and discovery matters. In writs and receivers matters — i.e., petitions for writs of mandate, applications for injunctive relief, corporate election contests and the like— calendar demands require the court to insist that hearings and trials be conducted on the basis of declarations or affidavits. Thus, when appearing on such matters, counsel should have covered all bases in writing. It is a rare case indeed where oral testimony will be allowed.

E. Helping the Court to Lose the File

The sheer volume of filings on the Eighth Floor of the Central District (in 1981, in excess of 52,000 matters were calendared and more than 37,000 were actually heard),

plus the sheer size of the courthouse and numbers of judges and clerks involved, inevitably leads to "lost" or "mislaid" files. This is not a fact anyone is proud of, but it is a fact of court life.

The files are normally transmitted to the proper department three or four days ahead of the hearing date. Checking out the file downstairs just ahead of that time is almost certainly calculated to cause it to be lost, since it will probably not be returned to its rightful place of rest in time to be found.

If two separate but closely related matters are scheduled for hearing in different departments on the same day or close thereto, let each clerk know.

Give advance notice if judicial notice of a particular file is to be requested. It will not appear by magic.

Make sure that all papers filed after the first papers which initiate a hearing are filed directly in the courtroom of the department which is to hear the matter. Otherwise, they may never show up in time for the hearing.

F. Missing the Calendar Call

If counsel expects to be late for a hearing in a law and discovery or writs and receivers department, let the clerk know in advance. Request a second call. The court will usually honor such a request. Caveat: if second call at the end of the calendar arrives before counsel does, counsel is usually out of luck.

Nothing is less endearing to the court than counsel who request reconsideration because of absence at the original calendar call (sometimes in addition berating the court for not having had the courtesy to wait) when counsel has not advised the court that he or she requests second call. Since supporting or opposing counsel often do not appear, the court cannot be expected to guess that counsel is going to be late. Thus, in the absence of warning, the matter may be decided without the appearance of either counsel.

III. Errors in Notice

A. Filing Matters with Improper Notice

The first task of a research attorney in one of the Law Departments is to see if there is proper proof of service, stipulations for continuance, etc. Deadlines for filing these documents and for filing opposing papers are strictly looked at. Matters may well go off calendar or be continued (the court not preparing them at all) if filing times do not meet statutory rule and policy requirements. In this respect, attention is called to CCP §1005, which requires a minimum of 15 days written notice of motion plus five days more for mailing within California. The statute also provides that all papers opposing such a noticed motion shall be filed with the court and served on each party at least five days before the hearing date unless the court has prescribed a shorter time. Court policy memoranda require the opposing papers to be filed no later than 4:30 p.m. of the third court day before the hearing date, unless otherwise ordered. Late filed papers may well be disregarded by the court. Counsel should also be aware of Rule 203.5 (a), California Rules of Court, which requires 45 days notice of a motion to dismiss under the two-year statute (CCP §583 subdivision (a)).

Once papers initiating a hearing are filed at the Clerk's window, all subsequent papers, opposing or supplementary, relating to that hearing should be filed directly in the affected department.

In the Central District, law and motion, discovery or writs and receivers matters that likely will take more than one hour to prepare are generally transferred to Department 88 (the department of the supervising judge). Advance warning to the court that such a matter is coming down the pike is helpful. Otherwise, it is probable that Department 88 will reschedule the hearing of the motion to a date several weeks later. Also, in the Central District, various matters noticed in the law and discovery departments are reassigned to the commissioners sitting in Department 66, 67 or elsewhere. Counsel should check to make sure what court will hear a particular motion.

B. Failing to Make Proper Service

Service must be personal if no appearance has previously been made. For example, if a petition under the arbitration statutes is to be filed, it must ordinarily be served in a manner provided by law for the service of summons in an action (CCP §1290.4 [b]). A petition for leave to file a late claim under Government Code §946.6 must similarly be served. Be sure to comply with the appropriate statute in making proper service; it is common for counsel to cause substituted service to be made under CCP §415.20 by leaving a copy at the office or dwelling of the party to be served and then neglect to mail another copy as required by statute. Where multiple parties are involved, service must be made on all of them.

C. Failing to File Proof of Service

If proof of service is not filed by 4:30 of the third court day before the hearing, the research attorney will note this fact and advise the judge. Often, the result is that the matter will not be prepared for hearing and will be ordered off calendar.

D. Failing to Serve Petitions for Writs in Advance

It comes as a distinct shock to some counsel that CCP §1107 requires that when an application is filed for the issuance of any writ, it shall be accompanied by proof of service of a copy of the application upon the respondent and real party in interest named in the application. In other words, you must serve the petition before you file it. Furthermore, the statute requires a five-day waiting period before the application is ruled on. If you need writ relief, do not embarrass yourself by overlooking the pre-service and five-day requirements. In the event of a real emergency, you may request the court to waive either of these requirements. Good cause is required to secure such a waiver. Opposing counsel (e.g., the Attorney General) often will waive the requirement. Such waiver by counsel must be in writing unless opposing counsel is present at an ex parte hearing to make the waiver on the record.

IV. Documentary Errors

A. Making Your Papers As Long As Possible

Judges in the law and discovery and writs and receivers departments are deluged with thousands of pages each week. Those attorneys — particularly those with word processors — who assume that more is better are distinctly wrong. Be brief, concise and to the point. State your case and your argument quickly and up front. That may be all that gets read.

B. Failing to Attach Exhibits

If you say an exhibit is attached to your document, make sure that in fact it is attached. Likewise, make sure that copies attached are legible. And don't blame your secretary for failure to follow through.

C. Attaching Exhibits to Points and Authorities Without Evidentiary Support for Them

Exhibits must be identified in an appropriate declaration or affidavit (unless, of course, they are the subject of appropriate judicial notice). Just dangling at the end of a memorandum, they lack any proper evidentiary foundation and are ignored. In referring to the evidence in points and authorities, give the exhibit number or the

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page and line of the transcript where it appears. Where portions of depositions are attached as exhibits, make sure the page numbers appear in some orderly fashion which coordinates with discussion in the points and authorities. If the page numberings of multi-page exhibits appear at the very top thereof, also add them to the bottom so that the court can quickly find what page you are referring to without engaging in a physical wrestling match with the file.

Do not attach interrogatories to moving papers unless their enclosure is essential to the sense of the motion.

If an exhibit is inadvertently omitted and counsel discovers this in time, it should be filed under separate cover with an explanatory face page.

D. Using the Wrong Citations

If you would like your citations to be read, cite the official reporter only. A citation to unofficial publications such as California Reporter is not adequate if you want the case cited to be considered. Unofficial reporters are not available in chambers. Also, a case merely so cited is suspect as being one in which a hearing was granted or which was ordered "depublished" from the official reporter.

Further, when citing cases in a memorandum, it is good practice to repeat the citation if you have not used it for a page or two. It is time-consuming to come to *"Jones v. Smith, supra,"* and then have to flip back through many pages of points and authorities to find the citation for the case. Further, provide an internal page citation if you are referring to a specific point in a case.

E. Other Neat Tricks to Guarantee that Your Documents Will Not Be Read

Running amok with staples. If you really want to have your papers ignored — even cussed at — have your secretary staple them in such a fashion that the top few lines of each page cannot be read without wrenching the pages apart. Using a reproduction process which prints on both sides of the paper without taking into account the fact that court files are fastened at the top is also calculated to discourage the judge from reading your work.

Not identifying whom you represent. It is amazing how often counsel forgets to state the name of the particular client. This leads to an interesting guessing game on the part of the court. After all, you do want the judge to read your papers from your own perspective.

Not lodging copies of authorities not readily available to the judge. Federal or out-of-state cases and citations to the Code of Federal Regulations, the California Administrative Code or city or county charters or ordinances are usually not available in chambers. Chances are they will not be tracked down for lack of time. If you supply copies, this makes it easy for the judge to refer to the authorities where necessary.

Hiding your attached declarations and exhibits. Unless you put tabs on all exhibits and declarations so that the court can readily turn to a particular document without having to sift through a mass of paper, they may well be overlooked.

Preparing your declarations improperly. Make sure all declarations are correctly executed. CCP §2015.5, as recently amended, gives a fool-proof way to do this: "I certify [or declare] under penalty of perjury under the laws of the State of California that the foregoing is true and correct." (date) (signature). This form is good for declarations executed both in and out of California.

Make sure the declarant states facts which show that he personally knows the matters as to which he declares. Do not expect to receive a temporary restraining order or preliminary injunctive relief on the basis of allegations made on information and belief. Positive statements are required.

Failing to point out document and date of filing if you are relying on a previously filed paper.

Previously filed matters can be called to the court's attention by reference, so as to avoid duplication, but the reference ought to be precise.

Conclusion

Most of the problems discussed above would never arise if counsel would just take the time to put themselves in the judge's place. Remember that, alas, yours is not the only pressing problem on the calendar.

—John L. Cole
Judge of the Superior Court

*The author acknowledges with appreciation the assistance of his research attorney, Arnold Mednick, Esq., as well as that of Judge Leon Savitch.

Letter from the President

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appointment of the additional judges.

On July 28, 1982, Supervisor Ed Edelman held a press conference in which he unveiled a proposed court reform package and announced that he could not "support the addition of more judges to our system until we make better use of those we already have, and improve the procedures under which they operate." The court reform package proffered by Supervisor Edelman contained 17 specific proposals. Some of the more significant include reducing the size of civil juries from 12 to 8; establishing judicial voir dire in civil and criminal cases; reducing the number of peremptory challenges from 6 to 2 in civil cases; eliminating the necessity for the judge's presence when testimony is read to the jury; adopting pretrial procedures in civil cases patterned after the federal court procedures; and authorizing discovery matters to be handled by referees.

Pursuant to a resolution adopted by the Board of Governors of the ABTL, a letter has been sent to the Board of Supervisors on behalf of the ABTL. The text of that letter is as follows:

> The Association of Business Trial Lawyers (ABTL), an organization of some 900 lawyers whose practice is devoted principally to business litigation, endorses and supports the passage of SB 1289 and urges the Board of Supervisors to take the steps necessary to accomplish its adoption by the Legislature and to implement the appointment of the fifteen (15) additional Superior Court judges authorized by the bill.
>
> The ABTL is aware of the court reform package proposed by Supervisor Edelman. Historically, the ABTL not only has supported appropriate court reforms but has provided assistance in their successful implementation. For example, due to the efforts of the ABTL, a substantial number of its members have voluntarily served as arbitrators for business and commercial litigation cases since the mandatory arbitration provisions were adopted. The ABTL and its members intend to continue to cooperate with the Superior Court and the Board of Supervisors in implementing court reforms which are designed to reduce the court congestion with which we are all too familiar. The ABTL believes, however, that such court reforms should be adopted and implemented based upon their respective merits and not as an extracted quid pro quo for the appointment of the much needed additional Superior Court judges.
>
> There is an existing need for the appointment of additional Superior Court judges and the ABTL urges you to support Senate Bill 1289 and pass the necessary resolution to implement it as soon as possible.

Since prompt action was required with respect to SB 1289 and the position of the Board of Supervisors, it was not possible to solicit the views of the members of the ABTL. We trust that the above letter, however, accurately reflects your views on this subject.

—Marsha McLean-Utley