TIPS FOR EFFECTIVE CIVIL AND CRIMINAL LITIGATION

From the Judge's Perspective

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1. Pretrial Discovery

In Criminal Cases

Doing the discovery correctly can make a critical difference in the outcome. Here is how to do it correctly.

In Civil Cases

Inappropriate use of pretrial discovery usually generates pretrial motions to compel; you want to avoid that; they are costly and can be problematical; is there an easier way to get your information; and a word to all responding parties, "answer" the question directly and avoid the cut and paste objections. Additionally, remember and understand what the statute requires you to do. Read the code sections carefully.

A. CCP 2030.010. Interrogatories

If a party to whom interrogatories are directed fails to serve a timely response, he or she waives any objection to the interrogatories, including one based on privilege or on the protection for work product. *Code of Civil Procedure* §2030.290(a). Further, the party propounding the interrogatories may move for an order compelling responses to the interrogatories. *Code of Civil Procedure* §2030.290(b).

Be certain you have documented: when the other side was served with the interrogatories, and when the other side failed to respond to the interrogatories, and how you really attempted to meet and confer. When inadequate responses have been received, document how you really attempted

to meet and confer, including the good faith nature of the effort. A simple, confrontational meet and confer email will cause your motion to compel further responses to be denied.

Consider sending out the interrogatories earlier rather than later; it can be very annoying to get a motion to compel on the eve of trial and may prevent a trial judge from granting you relief. Remember, you can use the answer of the responding party at trial even when the party is present; but you cannot use your own answer as evidence. *Code of Civil Procedure* § 2040.410.

B. CCP 2031.010. Inspection Demands

Have you Bate numbered all the documents delivered? Have you kept a copy of all the documents you delivered? Have you considered collecting all necessary and even unnecessary documents and simply Bate number and promptly delivering them without a request?

TIP – Be really selective on your questions; consider eliminating the cut and paste objections in your answers.

2. Court Trials

Always in family law/juvenile/small claims/traffic; sometimes in civil cases; occasionally in criminal cases.

What changes when there is no jury?

TIP – Maybe you really don't want a jury trial in every case where the opportunity exists.

3. Pretrial Conferences

Time estimates; verify complaint [counts] and [causes of action]; answer [what affirmative defenses will be tried and the corresponding CACI instruction or special instruction]; statement of the case or mini-openings; name of all witnesses; need interpreters; scheduling experts; *voir dire* and number of challenges; exhibits marked and exchanged; *in limine* motions; jury instructions submitted; verdicts submitted; dress out issues; security issues; imposing reasonable time limits; requests for chamber conferences; time qualifying juries on lengthy trials.

TIP – BE prepared.

4. *In Limine* Motions

Particular abuses; (a) using form in limine motions; (b) cut and pasted from another case(s)

Appropriate *in limine* motions in criminal cases

Exclude witnesses; Bifurcate priors; Exclude priors

Appropriate *in limine* motions in civil cases

Exclude witnesses; Exclude mention of insurance; Bifurcated punitive damages; Limit meds; Exclude settlement discussions.

Improper *in limine* motions

Exclude speculative testimony; Exclude prior incidents absent an appropriate foundation; Exclude witnesses not identified in discovery.

Prevent witness from testifying differently from deposition. *Kelly vs. New West* (1996) 49 Cal.App.4th 659 [It is a misuse of a motion *in limine* to attempt to compel witness or party to conform their trial testimony to preconceived factual scenario based on testimony given during pretrial discovery.]

***In limine* motions are designed to facilitate the management of a case, generally by deciding difficult evidentiary issues in advance of trial. *Amtower vs Photon Dynamics Inc* (2008) 158 Cal.App.4th 1593-1594. [The usual purpose of motions *in limine* is to preclude the presentation of evidence deemed inadmissible and prejudicial by the moving party. A typical order *in limine* excludes the challenged evidence and directs counsel, parties, and witnesses not to refer to the excluded matters during trial. (3 Witkin, Cal. Evidence [3d. ed.1986].) The advantage of such motions is to avoid the obviously futile attempt to unring the bell in the event a motion to strike is granted in the proceedings before the jury. What *in limine* motions are *not* designed to do is to replace the dispositive motions prescribed by the Code of Civil Procedure. It has become increasingly common, however, for litigants to utilize *in limine* motions for this purpose.]**

***Wheeler/Johnson* issues [Discriminatory Use of Peremptory Challenges]**

<u>TIP</u> – *In limine* motions are grossly overused and significantly abused.

<u>5. *Voir Dire*</u>

There are differences between criminal trial and jury trials.

***Civil Cases are governed by CCP 222.5* [Counsel examines in aid of both challenges for cause and peremptory challenges]**

The Court shall allow pre-*voir dire* opening statements.

Cannot impose specific unreasonable or arbitrary time limits or establish and inflexible time limit policy of *voir dire*

On stipulation counsel may question jurors outside Judge's presence.

Improper questions

Precondition jurors; Indoctrinating jurors; Question jurors re pleading or applicable law.

***Criminal case are governed by CCP 223* [Counsel examines only in aid of challenges for cause].**

The Court cannot impose specific unreasonable or arbitrary time limits or establish and inflexible time limit policy of *voir dire*.

***Voir dire* of any prospective jurors shall, where practicable, take place in the presence of the other jurors in all criminal cases, including death penalty cases.**

<u>TIP</u> – Is there a plan; what's your point; why are you asking the question; avoid asking each juror "what's your favorite hobby?"

<u>6. Trial Objections</u>

Grossly <u>too many trial objections with no meaningful point</u>; for example, "leading," or "lack of foundation," or "compound," etc. Before you object, ask yourself: "What's the point?" "Will they get this evidence in anyway simply by rewording it?" "Am I just annoying the judge or the jury?" "Will my objection have any impact other than providing additional emphasis for my opposing party's evidence?"

TIP – Object only when it is really important to your case; remember, if your objection is successful and the lawyer has to ask the question "again," the consequence is that if the jury didn't get it the first time, they surely will get it the second time. When you object all the time the fact finder may get annoyed and simply give you a major demerit.

7. Expert Witness Designation and Expert Witness Depositions

Too often lawyers do not do their homework in preparing their expert witnesses for their deposition, and then have to "backfill" at trial to fill in the gaps. This is challenging for bench officers who have to monitor the introduction of that evidence, based upon the opposing party's objection; it may result in the exclusion of key evidence you otherwise might get in.

A. *Kennemur v. State of California*, 133 Cal. App. 3d 907

You should be careful to have your expert and/or the opposing expert "state all of his or her opinions and give all of his or her reasons for the opinion." The Legislature has singled out the pretrial discovery of expert opinions for special treatment. When appropriate demand is made for exchange of expert witness lists, the party is required to disclose not only the name, address and qualifications of the witness, but the general substance of the testimony the witness is expected to give at trial. This means the party must disclose either in its witness exchange list or at its expert's deposition, if the expert is asked, the substance of the facts and the opinions to which the expert will testify at trial. Only by such a disclosure will the opposing party have reasonable notice of the specific areas of investigation by the expert, the opinions he or she has reached, and the reasons supporting the opinions, to the end that the opposing party can prepare for cross-examination and rebuttal of the expert's testimony. Only by such a disclosure will the possibility of a reasonable settlement of the case before trial be encouraged.

B. *Schreiber v. Estate of Kiser* (1999), 22 Cal. 4th 31

Remember that you do not have to state what the non-retained expert will say, but you still have to designate that expert on your disclosure. *Schrieber* involved a personal injury action, but I think it has application to any case when you intend to call a witness who is not "retained." For example, in a family law case that calls for the evaluation of a community or separate property business or professional practice, you should consider what you need

to do about "designating" the "business or personal accountant." You do not have to state what the non-retained expert will say, but you still have to designate the expert on your disclosure.

TIP – Work really hard getting your expert witness testimony ready for trial.

8. Cross-Examination of Witnesses

It is a "sprint," not a "marathon." Make your points and sit down. Targeted and scripted cross-examination is invited; freestyle and unorganized questioning can lead to sloppy outcomes and sometimes embarrassment. If you have a point, make it; if not, move on to something more productive.

TIP – Keep it simple.

9. Trial Briefs and Issues You Need the Trial Judge to Decide

A. In any motion be certain that you give the judge every issue you want addressed somewhere in your motion papers; make it succinct; put it all in one place, preferably at the end or the beginning. Don't make the judge "hunt" for what you really want, because the judge simply does not have the time to do so. Draft your motion in a way that makes it easy for the court to grant it; be very clear and simple in setting forth both what you want, and why it is appropriate.

B. In all bench trials be certain you give the judge a trial brief, or at least a pocket brief, addressing all the issues. It is very difficult for the judge to properly address at trial any issue that you knew or should have known was an issue before trial, if it is not clearly put in front of the judge from the start. It is very annoying to have you, for the first time, articulate in your request for a Statement of a Decision the principal controverted issues (see Rules of Court Rule 3.1590); it is really hard for the judge to do it right, weeks after the trial.

TIP – Educate, educate, educate.

10. *Ex parte* motions.

They have become increasingly more common; maybe because our operational style of living has become more instantaneous with the common use of emails and cell phones.

A. Always provide a "stand-alone order" and it is helpful if it provides for both (a) an order shortening time, along with (b) an order for granting the relief requested.

B. Recognize it is very unusual to grant substantive orders on *ex parte* motions: the judge really needs to hear from the opposition.

TIP – Since you are going to do it, keep it brief.

11. Making unscheduled Motions [Requests] at the [CMC] Hearing.

A. The calendar is not a "workshop." Do not raise new issues at the hearing; do not ask the judge what you should do to solve a problem.

B. If you have a "housekeeping" issue, consider talking to the other side before you raise the issue to the Court; it is always perplexing to have a lawyer sitting in the courtroom for 20 minutes and then raising a housekeeping issue at the bench and not having previously discussed the matter with the other side.

C. Be very clear from the start about what you are seeking by filing your motion. Do not attempt to change the nature of your request in reply papers, or supply evidence or make arguments to support the request for the first time in reply papers. Reply papers are only used to respond to opposition arguments, and cannot be used to plug holes that existed in the moving papers. The Court cannot grant a motion on any basis not clearly set forth in, and established by, the moving papers.

TIP – Make sure EVERYTHING you NEED is in your moving papers.

12. Evidentiary Objections.

In all motions, and in particular in Summary Judgment Motions, we get a very large number of declarations with very significant hearsay and other inadmissible statements. They routinely generate a large number of *evidentiary objections.*

As to the evidentiary objections, we are familiar with *Sambrano v City of San Diego* (2001) 94 Cal.App.4th 225 and its admonition in Summary Judgment cases. We have read California Rules of Court, Rule 3.1354(b) [format for objections – each written objections must be numbered, and (1) identify the name of the document, (2) state the exhibit, title, page and line number, (3) quote or set forth the objectionable statement or material, and (4) state the ground for each objection.] We have read *Tarle v Kaiser* (2012) 206 Cal.App.4th 219 [a party must oppose evidentiary objections made in connection with summary judgment or forfeit any appellate challenge to rulings on these objections]. We are familiar with cases such as *In re Marriage of Heggie* (2002) 99 Cal.App.4th 28, [It is very common for practitioners to include argument in their declarations, but it is a sloppy practice]. CCP §436 [The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper: (a) Strike out any irrelevant, false, or improper matter inserted in any pleading.] Additionally, CCP 437c(q) provides: In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion; objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review.

We have said the following with rhythmic regularity but no one seems to listen. We will say it again. Lawyers must use some reasonable restraint in their submission of declarations that contain inadmissible statements and opposing counsel must use some reasonable restraint in making their objections. We urge again, as we have in the past, to (1) ask counsel who are submitting the declarations to read them before filing them and eliminate the inadmissible testimony, and (2) ask counsel who are objecting to the inadmissible testimony to resist exercising every conceivable objection, on the theory that in most cases there is virtually no harm done by the inadmissible statement and in every case we are inevitably asked to read and rule on each objection.

Further, make sure the objections you make are appropriate for the circumstances; we have seen a surprising number of objections to declaration testimony, particularly in summary judgment proceedings, made on grounds of "asked and answered," "best evidence," and even "more prejudicial than probative." Use of inappropriate objections not only annoys the judge, but also undermines your credibility with the judge.

TIP – Read every declaration you submit as if you were the judge who had to both read it and rule on objections to it. Only object when the sustaining of the objection will advance your position in some material respect.

13. Use the Overhead Projector at Trial.

Remember, judges and juries are all very accustomed to getting their information from their television set, cell phone screen, their iPad, text messages, etc. Fact finders have all become visual learners and are no longer solely audio learners. Show it and show it again. Mix it up; show some evidence and get some with questions and answers; keep them interested; the entertainment industry and the communication industry have changed the way all people grasp what you are telling them; you must grab their curiosity and their intellect.

TIP – Be a communicator.

14. Form of the questions:

a. Please resist asking a question of a witness as follows: "Didn't you tell me in your deposition that . . ." The question is argumentative and the question only starts an colloquy between witness and counsel; when you ask the question, it tells me you have not tabbed the question and answer from the deposition to your trial script.

b. Please resist asking a witness: "I will represent to you that a previous witness said . . ." Start your inquiry with "Assume a previous witness testified that . . ." Simply stated, the lawyer is not a witness and cannot testify.

c. Please resist asking hypothetical questions to lay witnesses, e.g., "assuming another witness testified that the light was red, and you have testified the light was green; is that witness a liar." Hypothetical questions to lay witnesses are invariably argumentative.

TIP – Think before you ask your question.

15. Grasp the Opportunity.

We love this work because it is right; the law is the great leveler, all men and women are equal under the law, this is not an idea, it is a living reality.

Millions of people wish they had our legal system and we have the opportunity to live it every day. Don't become a skeptic or a cynic; it is our heritage and the practice of law is a great challenge and a great opportunity; embrace it by remembering how lucky we are to have such a system within which to work; although it might not be perfect, it is far better than anything else ever devised.

TIP – Be really enthusiastic about what you do.

Best wishes and good luck on your next trial

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