From Hon. Jacqueline Connor (ret.)

ADR SERVICES, INC. *Consider It Resolved!*

12 BEST WAYS TO SABOTAGE YOUR MOTIONS

CAALA Advocate Magazine 2010

There are many ways to skin a cat. There are at least fifty ways to leave a lover. There are as many if not more ways to present an argument in a motion or brief.

That doesn't mean most of them are good.

In fact, some strategies are so counter productive that it literally takes extra judicial discipline and extraordinary patience to wade through the detritus, hyperbole, repetition and padding to figure out what the point is that is being made and to then give it serious consideration. The best briefs tend to have everything in common. They are direct, professional, focused, simple and straightforward. They are written in a courteous, impersonal tone, point out the flaws and weaknesses in their own positions and accurately cite and describe cases being relied upon. There are no typos or grammatical errors. They refer to the actual parties in the case, they are prepared with the same appearance and size of font, and they often include a summary argument of the legal argument in the opening. They don't scream with boldface or underlining.

These factors appear to be obvious, but they have become increasingly rare in the multiple pages of briefs, motions, declarations, attachments and exhibits that are submitted daily to bench officers. As the economy squeezes us and the ability to promptly and timely schedule motions becomes more problematic, counsel would be well advised to rethink their strategies and approaches in their written submissions.

A small and totally unscientific survey of respected judges and experienced research attorneys revealed the same complaints and pet peeves. The surveyed judges have been unanimously critical about certain practices that seem to present themselves on a regular basis. In the hope that someone may recognize a practice or two and may rethink the viability of the technique, here are the top twelve worst motion practices of which many of us despair. As noted, most seem so obvious as not to warrant comment, but they nevertheless are part of the daily diet of civil judicial practice.

(1) MISCITING CASES

If a case is not on point, it is truly a grave mistake to cite it. If it is depublished, it is a worse mistake. Credibility is at stake. Counsel too often offer boilerplate arguments citing a string of cases, and the validity of the citations have clearly not been checked. It is obvious that many of the cases have not even been reviewed in any fashion. The immediate and obvious conclusion is that the writer is deliberately trying to trick the court, even if it is simply an error or is sloppy workmanship. Once the miscitation is caught, your credibility has taken a serious hit. The loss of the trust of the court is not something that counsel can afford to give away, as it is likely to impact the view of subsequent submissions and

decisions. Opposing counsel is usually only too happy to accommodate by pointing out the "dishonest" work, if not in the reply brief, then in oral argument. The bottom line is that if the case is not on point, it should not be cited. If it is tangentially related, that connection should be disclosed. If it is dicta, the best way to maintain integrity is to clearly disclose that.

(2) EXPLANATION OF CASES CITED

I have found that judges differ in their preferences as to how case descriptions should be presented, but a brief explanation or description of the case should be included with every case cited. I personally find that string cites and descriptions in parentheses makes it more difficult to follow the logic of the argument and the string cites and descriptions can become distracting. It may be worth considering relegating the descriptions to footnotes, and limiting string cites to only those most critical and recent. Regardless of the format used, in every case cited, the explanation should be included. The short explanation confirms that you have read the case, that you know what it stands for and why it is cited, and it makes it easier for the judge to rely on and understand how the case fits into your argument. The inclusion of the explanations adds to the credibility of the writer and will generate greater confidence in the positions being advocated.

(3) INVECTIVES AND PERSONAL ATTACKS

There is no excuse for the use of invectives and personal attacks in filings, yet judges see them all too regularly. They are never less than distasteful and reflect more about the writer than the target. Attacks are appropriate only against opposing arguments and opposing positions, not opposing parties. Even then, there is never any excuse to become abusive and personal. The first reaction is an urge to rule against the abuser, which is an excellent reason why the most effective and powerful response to invectives is to stay on the high road. There is little that is more impressive than when an advocate refuses to respond to personal and abusive attacks. It is even more impressive when no mention is even made of the abuses. Oral abuse in the courtroom, outside the presence of the judge, invariably gets back to the judge through court staff. It is rarely necessary to even make mention of such behavior. Though judges are trained to respond to the merits of a position and not the quality of the articulation, when there is a judgment call to make, it behooves the writer not to give away precious points of credibility by diving into the gutter.

If a cooling period helps, then reviewing the pleadings or response in the light of day, preferably the next day, is a wise decision. Make sure to reread your work before sending it on, and err on the side of fewer adjectives, not more. If your opponent elects to proceed with emotional tantrums, view them as a gift to distinguish yourself as a calm, experienced professional.

(4) PINPOINT PAGE CITATIONS

When citing a case, the pinpoint page citation must always be included. With many cases extending ten, twenty, thirty or even fifty pages, the efforts of the judge trying to wade through pages to find the right spot, and likely NOT finding it, will too often result in the loss of the value of the case as a supporting reference. Even worse, too often it appears that when the pinpoint citation is not included, it is a not-so-subtle red flag that the case simply does not say what the citation claims or that the writer did not read it. It has not been an uncommon experience to spend precious time trying to find what appears to be

compelling language, only to discover that there is no such language, with a resultant loss of confidence in the integrity of the writer. This dovetails in with item (1) above regarding accurate citations.

(5) HIGHLIGHTING, BOLDING AND UNDERLINING

Highlighting, bolding and underlining "critical" parts of a written document is more than simply annoying and distracting. It is insulting in its suggestion that the judge is too incompetent to figure out what the important points are. Personally, it reminds me of the reaction most judges have when counsel start an argument with the well-worn favorite phrase "with all due respect, your honor….." The feeling that is generated by such highlighting, underlining and bolding passages is that of being screamed at. Not good. Doesn't help. Au contraire, it hurts the cause.

(6) UNFOCUSED ARGUMENTS AND ATTACHMENTS

Advocacy that tends to paint in broad brushes, suggests that the writer doesn't really understand the legal principles involved. Long rambling paragraphs and cluttered verbiage suggest a cluttered, undisciplined, unprepared writer. It often appears as if the writer is throwing enough stuff out in the hopes that something sticks. Rather than sticking, credibility is again lost and it is far more likely that nothing will "stick." The same theme shows up when too many cases are cited and too many exhibits, far beyond what is needed to support the point, are attached. Long passages from cited cases, rather than short, focused sections that make the point, also suffer this criticism. Unnecessary repetition can use up the limited attention a judge can apply to a brief. A focused, stiletto approach, on the other hand, presents a powerful impression of confidence and preparation. The contrast between a focused argument and one that drones on and on is stark and compels a decision in favor of the disciplined presentation.

Along the lines of unfocused arguments falls unrealistic demands for sanctions. They won't be granted, they cause more dissension between the parties and there is no upside, other than to keep the waters roiled in an unprofessional manner. Similarly, requests for costs that are clearly not permitted under section 1033.5, such are parking costs, is a red flag denoting inexperience, sloppiness, a lack of ethics, or all three.

(7) BOILERPLATE MOTIONS IN LIMINE

Most judges will include high up on their list of criticisms boilerplate or nonsense in limine motions. Despite the fact that cases (most notably and reliably Kelly v New West Fed. Sav. (1996) 49 Cal. App. 4th 659), Rutter guides, bench books, trial manuals and practice guides all explicitly caution trial lawyers NOT to file inappropriate or wasted motions, ubiquitous stacks of unnecessary in limine motions are too often the norm. In limine motions are designed to advance an explicit, specific legal ground to exclude evidence and they must be directed to an identifiable and identified body of evidence.

Many of the boilerplate motions are premature or simply state the law. They typically include motions to exclude evidence not produced in discovery, or motions to exclude references to insurance. Issues of trial logistics and common courtesy are not proper subjects of in limine motions. A rule of thumb might be whether opposition is expected or not. If clearly no opposition will be filed, it is likely that the motion

itself should not have been filed. Rulings are not required. Many motions require actual trial testimony or context, which all too often is not provided. Many include requests to exclude information but the information at issue is not disclosed, making a ruling impossible. Many also are improper summary judgment motions or motions for bifurcation that are simply inappropriate as in limine motions.

There are many good reasons for proper, focused in limine motions. Jurors tend to be annoyed by the distractions of objections during trial, of delays caused by sidebars, and fighting over procedural matters that do not affect them. Trial lawyers are appropriately wary of having to unring bells. As a result, there is a strong argument to be made for filing in limine motions to avoid objections in trial and not having jurors exposed to evidence that they cannot consider. While it may appear that the line between proper and improper in limine motions might not be clear, it is generally very easy for judges to run through stacks of in limine motions and pick out the "real ones." The "real ones" are the only ones that should be filed. Providing an opportunity to consider the request and understand the law creates a much better possibility of a thoughtful, accurate ruling than a motion or objection sprung on the trial judge in the middle of trial.

(8) FACE PAGES OF COMPLAINTS

A surprisingly frequent error occurs with filings of complaints and cross complaints whereby the causes of action numbered on the front page of the complaint does not match the causes of action in the body. Also, filings have included numbered causes of actions with no titles or any indication what the cause of action entails. This lack of attention to detail can cost the litigator the respect of the bench officer.

(9) BOILERPLATE ARGUMENTS

In this day of computer generated motions, it is amazingly frequent to find, among spelling errors and typos, entire passages clearly lifted from other cases. The obviousness of the cannibalized material is hard to disguise when the correct parties' names are not even inserted in the passages.

(10) ATTACHING PROPOSED AMENDED COMPLAINTS

When trial counsel elects to file First Amended Complaints (with the required permission needed for all amended complaints after the first one) court and attorney time is wasted when the proposed amended complaint is not attached. If the decision is to file an amended complaint in response to a demurrer, subsequent Amended Complaints should be filed by the date the opposition is due. Alternately, a notice of intent to file a First Amended Complaint should be filed by the date opposition is due. The failure to oppose and the filing of an amended complaint the day of or the day before the hearing on the demurrer is an enormous imposition on the court and disrespects the time and workload of all related parties.

(11) KNOW THE RULES

Periodically review the court rules. Your failure to follow them is the mark of inexperience. The California Rules of Court, particularly rules 3.1110, 3.1112 and 3.1113 tell you exactly how the motions should be formatted and what is required. Despite the clear directions, many times exhibits are not separated by tabs bearing the exhibit designation under 3.1110(f), which makes the exhibits hard to find.

References to exhibits and declarations must reference the number or letter of the exhibit, the page, paragraph or line number that is applicable. CRC 3.1113(k) Memorandum of points and authorities exceeding ten pages must include a table of contents and table of authorities, and a memorandum exceeding fifteen pages must also include an opening summary of argument. CRC 3.1113(f). Such summaries are always welcome, regardless of the number of pages.

Page limits are there for a reason and should be adhered to absent leave of the court. Manipulating font sizes and margins does not impress. Brevity and focus are always a goal, and lawyers should resist the urge to inflate a motion simply because a certain number of pages is permitted. Repetition is never welcome.

Be familiar with deadlines. For most motions, opposition and reply are due nine and five court days before the hearing date, excluding holidays and, don't forget, furlough days. Untimely filings can be disregarded by the court absent the accompaniment of a declaration, and the declaration must support excusable neglect. As the economy squeezes us all, it is appropriate to remember that all calendar inventories are going up almost daily and your case is, unfortunately, not the only matter on the radar screen. Get it in on time.

Opposition and reply papers must be filed directly in the department unless otherwise instructed. Filing in clerk's offices can virtually guarantee that the court will not have access to the filing in any timely fashion.

Where motion dates must be reserved in advance, each and every motion must be reserved for a date certain. Counsel often simply tag additional motions on to the date without prior approval of the court. This does not endear you to either the judge or court staff.

(11) NOTICES OF RELATED CASES

This is a personal peeve….granted, the official forms don't require it, but when filing a notice of related cases, get extra points by including the complaint of the case you are trying to relate or include a declaration describing the facts showing why the cases should be related. Also, please remember that relating does not equate to consolidating, and consolidating can't happen unless and until the cases are related.

Questions?	Email Judge Connor: judgeconnor@adrservices.org
Mediate with Judge Connor	Contact **Audra Graham** at **ADR Services, Inc.** (310) 201-0010 / audra@adrservices.org