From Hon. Jacqueline Connor (ret.)

MAKING THE EVIDENCE CODE WORK FOR YOU

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Having come from criminal justice, where most practitioners are constantly in trial, the shift to civil practice was most jarring when dealing with litigators with less practical experience with jurors and jury trials. The biggest gaps showed up with litigators' lack of familiarity with the Evidence Code. My first up-close introduction to this gap came when I asked a trial lawyer "352??" and heard "No, your honor, it is only 2:30 p.m." [Evidence Code section 352 regarding relevance.] Having the perspective of a litigator and a bench officer, it is my firm belief that the lawyer who masters the Evidence Code masters the courtroom.

The reality of trial practice is that today's jurors are not the same jurors of even our most recent past. Generation X (post baby boomers) and Y ("Echo Boomers") jurors have entirely different expectations and perspectives than baby boomers. Respect for authority and credentials are notably reduced. Attention spans are vastly more limited. Snappy sound bites are expected, with entertainment and visuals de rigueur. Our youngest citizens have never been without iPods, texting or instant access to the net. [It is a good idea to "Google" yourself before every trial to see what jurors might be seeing.]

Blogging, twittering, Facebook and MySpace are part of the air that they breathe.

The current economy creates an additional significant dynamic that impacts the way jurors view lawyers and the things lawyers are asking for. An increasing number of jurors are just hanging on to their homes, their jobs or their ability to get through the day, the month, the year or the rest of their retirement.
The conversion to One Day One Trial in 2000 in California is a significant variable that has altered the landscape, as well, by ensuring that very few escape jury duty. This means litigators will see everyone from CEOs to doctors to retired engineers to actors to just plain folk.

Effectively using jurors' time and attention become particularly critical when facing each of these dynamics. The older jurors need to get back to businesses or their lives. The younger jurors are quickly bored and resent being kept from their technology. (It is not uncommon to hear of jurors resorting to Sudoku or texting while in trial. Blogging and texting during trial have become culturally acceptable despite admonitions from the bench.) With this background in mind, the following assumptions underlie the practical suggestions and observations offered. It is assumed that trial lawyers:

- want to know exactly what evidence will be admitted in trial;
- want to present their own evidence effectively;
- are committed to avoiding wasting jury time;
- are sensitive to the cost of losing juror goodwill and attention;

- are sufficiently prepared so as to avoid repetition; and
- agree that objections during trial are not a good thing.

On this last point, objections in front of the jury are truly a lose-lose proposition. As acknowledged by experienced trial lawyers, if you win the objection, the jurors wonder what you are trying to hide. If you lose the objection, you are a loser. In addition, integrity and credibility come squarely into play with the judge. If an issue is truly important, most judges consciously or unconsciously assume the prepared trial lawyer would have brought up the issue in advance in an Evidence Code section 402 or *in limine* motion, permitting all sides and the judge to give it the attention and consideration it deserves. If the objection is made for the first time in front of the jury, that same attention simply cannot and will not be accorded. If the reason it has not been addressed in advance is that the matter is not that important, is it worth making the objection in the first place? It is the rare piece of evidence that cannot be spun into something that helps in some way.

Many judges are increasingly trying to reduce downtime during a trial. Jurors hate delays and they will hold the trial lawyers responsible. Consequently, judges are increasingly loathe to grant sidebars for objections or will relegate them to the end of the day, on lawyer time instead of juror time. There are truly few issues in a jury trial that cannot be anticipated in advance by thoughtful and prepared trial lawyers, and the risk of getting the wrong ruling increases exponentially with the pressure of time and impatient jurors.

There is no upside.

Having staked out these positions, consider the following proposed solutions.

Exhibits

All exhibits should be marked in advance, in blocks of numbers. These can be separated into categories if natural groupings come into play.

Plan on stipulating to the admissibility of all exhibits and carefully consider whether an objection you might be contemplating is really valid. If a stipulation is not possible, the matter can be resolved by the court in advance in a 402 hearing, but common sense dictates that you have a good reason to contest admissibility. Legal procedure involving foundational issues should never be wasted on precious jury time. If a matter legitimately involves admissibility flaws, a hearing can take care of the problem and the trial lawyers will know where they stand before the trial starts. If the goal is simply to make the other side jump through formal hoops, reconsider whether that is a good use of court time, your relationship and credibility with the other side and the judge, and your ultimate goals. Obviously, if the inquiry on foundation goes to weight rather than admissibility, stipulating does not make sense. Items solely for impeachment don't fit in this scenario either, but the risk of being accused and sanctioned for sandbagging and perhaps not being permitted to introduce something not previously disclosed, should be weighed carefully.

This approach will also ensure that all exhibits have been shown to the other side so that jurors and the

judge are not subjected to the painful silences that occur when one side demands to see something they claim not to have been shown before, and the quarrel starts over whether it has in fact been disclosed. (Bates stamping all discovery always eliminates these major headaches in trial.)

Though premarked, each exhibit should nevertheless be formally marked on the record when used for the first time in front of the jury, so both the court and jurors can keep track and identify each item. To the extent it is more common than not for exhibits to be marked but never actually used in trial, both sides should have an idea whether they expect all exhibits to actually go into the jury room, or whether the jurors should only see those items used in their presence. In the absence of an agreement, it would make sense that based on pretrial stipulations, all sides should reasonably rely on the fact that all exhibits and documents will physically go into the jury room.

All exhibits must be reviewed with a fine tooth comb. This is particularly true with the most voluminous exhibits. It is a very common phenomenon for jurors to "find" things in the evidence that the attorneys never saw, disregarded or interpreted differently. Not infrequently, juror-discovered evidence can make or break a case. This can occur with handwritten notes that can be interpreted in ways other than contemplated by counsel, or they can be abbreviations or other documentations that might mean different things to different people, even reasonable people. If something isn't needed, it should be eliminated. If only one paragraph of a long contract is at issue, for example, simply eliminate the noncritical portions. If this makes counsel uncomfortable, the jury can always be advised that the rest of the pages deal with unrelated matters and that they are not to be concerned or make any assumptions about the absence of the additional pages. If anything, the jurors will be grateful for the focus provided. Any factual issues that are not truly in dispute should not be dragged in to waste jury time and goodwill. Counsel who stipulate to issues or facts are usually rewarded with enhanced credibility with jurors, particularly if the matter is of import to the other side. The opposing party tends to appear confident and not afraid of the "truth." Stipulating, especially when it is clear the evidence is coming in anyway, can project the impression to the jurors that perhaps this issue may not be that damaging. In some instances in determining whether to stipulate to a fact or issue, some trial lawyers feel that the force and impact of the item or fact may get lost by "giving it away" as a stipulation. If such is the concern, the particular piece of evidence or fact being stipulated to can be blue-backed or otherwise marked, and admitted as its own exhibit.

Having pre-established which exhibits are available for the trial, litigators then have the freedom to use them as visuals in miniopening and formal opening statements as well as argument. [Miniopenings are 3 to 5 minute opening statements made to jurors before *voir dire* and replace the traditional "statement of the case." See California Rules of Court 2.1034 effective January 1, 2007.] In cases with multiple documents, it also permits the litigators to take advantage of the ability to create a prepared list of the exhibits (numbered and briefly described) with copies for each juror at the commencement of trial. If this list is provided in advance, jurors can take notes on them, identify them for their own purposes, and easily find critical exhibits during deliberations. The reality of having to fish through stacks of documents after days or weeks of testimony usually means that jurors don't bother. Also, even experienced trial lawyers make the mistake of identifying exhibits with descriptions when first used, but thereafter referring to them solely by number. Jurors will not remember what the numbers relate to. Having their own copy of the list of exhibits lets them refresh their recollections as to exactly what that document is.

Jury Books

Even in the shortest of cases, jury books can be of great value to the lawyers and jurors. "Jury books" are inexpensive three ring binders that house exhibits, note paper and instructions. Jurors often complain that they cannot see exhibits at the time when they are most meaningful, being when the exhibit is in use. Seeing them days, weeks or months after the fact diminishes their power. Enlargements projected onto screens present a significant improvement to papers being waved around in front of a testifying witness. However, a well received alternative is to select key exhibits and include them in advance in the jury book so that each juror can see, feel and take notes on that particular piece of evidence.

It is my practice to limit such inclusions to five separate pieces of paper (not five exhibits of variable lengths). This permits counsel to narrow their focus on what is truly critical and gives the jurors a chance to see the item at the time that it is being used. Where spatial or geographical issues are important, exhibits should always include diagrams or maps. These are typically included in the "top five" for the jury book. Where the timing of events is critical, timelines are also invaluable, particularly as one of the "top five."

A few litigators have expressed concern that giving jurors their own copies of a few exhibits gives those exhibits too much weight. These litigators usually confess to being "control freaks," but the irony is that the concept of control in a jury trial is illusory. [The last moment of any control is when the jury is accepted.] Obviously the numbers of exhibits provided individually to jurors can be increased or decreased depending on the circumstances of a case, with the caveat that the higher the number of exhibits provided individually, the less likely they will be examined. There is no point in overwhelming the jurors. However, if jurors' decisions turn on how they view particular exhibits, photographs or documents, keeping them away from them until the trial is over and these key items become part of the flood of paper they are given, does neither side any service and would seem to warrant less "control" over the results. (Unless the point of the litigator is to keep the jurors from seeing the exhibits or a particular exhibit.)

In addition to the "top five" exhibits, jury books ideally should include a copy of the verdict form as well as preliminary instructions outlining the basic elements of the causes of action. Having these elements at the start and knowing what the "final exam" looks like, jurors will understand the significance of key points, evidence and issues as they are being presented. It does little good for the litigator to put on evidence relating to an element of a cause of action, only to have jurors tune out because the significance of that evidence is not apparent and will not become apparent until the jurors are formally instructed long after the testimony and evidence are forgotten.

If the facts of the case contemplate any technical jargon, a glossary of terms is always effective. Typically, the attorneys are very familiar with the particular terms of their case and their witnesses and experts will give fine explanations and definitions of such jargon…exactly once. Jurors don't always pick up that familiarity with a single definition and a simple glossary can keep them engaged and in the loop.

Depositions

Deposition transcripts are most effectively lodged, not filed, with the court on the day they will be used. Providing stacks of transcripts in advance will make it likely that they will not be found when needed and will present logistical problems for the court clerk. Experienced litigators never permit logistical problems to weigh down court staff.

Familiarity with the rules of evidence relating to the use of deposition transcripts in trial can be critical. A regular review of CCP Section 2025.620 before trial and before the taking of a deposition is well advised. "Objection: not a proper use of the deposition transcript" is a frequent but invalid evidentiary objection. As Section 2025.620 outlines, some objections are waivable and some are not. Non-waivable objections include those relating to the form of the question, the reasoning being that had the objection been made at the deposition, the error could have been summarily cured and the question reposed. Objections based on foundation need not be made in advance and can be made for the first time at trial. CCP Section 2025.620(c).

Also, a common misuse of deposition transcripts occurs when counsel insist on reading portions that actually do nothing to contradict or disprove what a witness has just said. Use of prior testimony to impeach means that there is something to impeach. The reading of sections of a transcript that sound exactly like what the witness just said is a common occurrence in trial, and wastes juror goodwill.

Some attorneys believe that before a witness can be confronted with prior deposition testimony, the witness must be provided with a copy of the portion at issue to be read silently before examination can proceed. Nowhere is this required by Evidence Code Section 770.

Video presentations of deposition testimony can also be very effective but counsel should not be sabotaged by their lack of compliance with notice components, the opposition's opportunity to object, and the necessity to lodge written transcripts in advance with the trial court.

Technology

It goes without saying that Murphy's Law operates in good standing during jury trials. If the system can fail, it will. Ensure that any use of technology is tested and in working order in advance of use. A backup system has been known to prevent premature aging. Even with the best of technicians, I have never yet seen an entire presentation via Elmos or computers not malfunction sooner or later. Counsel must know how to punt if punting and manual methods become necessary. The silence as lawyers or their technicians try to get the computer to work, the screen to light up, or the focus to provide clarity…can be beyond excruciating.

Experts

Most judges trying civil cases agree that one of the most problematic issues in trials revolve around objections to expert testimony, whether it relates to scope, discovery or foundational issues. This should all be handled in advance, whether it involves proper notice of the expert, qualifications of the expert, the scope of the testimony to be offered, or *Kelly-Frye/Daubert* issues. It is nearly impossible for judges to switch gears in the middle of a trial to consider often complicated disputed expert issues and to shut down

the trial while attorneys scramble to find the deposition testimony that supports their argument that the expert should or should not be permitted to render an opinion on a particular issue. If a preliminary ruling has not been secured, attorneys must ensure that their arsenal to support their objection or defense to an objection is at their fingertips. Again, if the issue is important enough, it should have been anticipated and resolved.

He who knows the Evidence Code has a serious strategic advantage in the courtroom. But he who keeps the Evidence Code out of the trial by handling evidentiary issues in advance is indeed the Master.

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