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What Judges Are Taught About Trials

Hon. Patricia Lucas (Ret.)

Hon. Beth Freeman

As your case advances toward trial, have you wondered what your trial judge thinks about, stresses about, when it comes to managing the trial? If you have, that's a good thing: the best advocates are the ones who put some effort into imagining, and then understanding, the judge's experience and mindset. It's a variation on the conventional advice about a judge's questions during motion argument: pay attention to these precious windows into the mind of the decision maker.

Trial management is not all intuitive, and judges go to class to learn the law and to

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Also in This Issue

The Importance of Mentoring Junior Trial Attorneys

Hon. Marie S. Weiner (Ret.)

Law firms now recognize the importance of having junior trial attorneys make substantive court appearances and participate in civil trials. This effort needs to go hand-in-hand with taking the time to mentor those junior attorneys about how to handle themselves in court. I suggest that law firms and senior trial attorneys revisit the training method of individual mentoring, and take the time to do so.

This article is the *second* in a series, identifying overlooked opportunities for mentoring that should be provided to junior trial attorneys. All of the examples are real.

Putting Deposition Testimony into Evidence

You took the deposition of the witness, and now you want to use it to impeach that witness at trial. Or you simply want to put certain deposition testimony into evidence, because the witness is not available for trial. That's when the momentum of the trial comes to a grinding halt – because the junior trial attorney has not been mentored about how to actually do this. So I, the judge, have to help walk them through the process

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so that the trial can continue – unfortunately right in front of the client or jury. Or you might have a judge who doesn't give a darn whether or not you have a clear record on appeal – because that is *your* job – so they simply allow the attorney to fall on their own petard with the mumbled mess being presented by the junior trial attorney, that may or may not be understood by the court reporter. See why it is better to take the time to train the junior trial lawyers *before* they go to trial?

Initially, the original deposition transcripts need to be lodged physically with the department of the trial judge. Photocopies can be used instead if counsel for the parties submit a stipulation and proposed order prior to trial. The judge needs the deposition transcript in order to be sure that it is read correctly into the record, and to rule upon any objections made at the deposition before the testimony is read into evidence.

Here is an example of a standard way to use deposition testimony for impeachment: "I would like to read from the witness' deposition taken on November 14, 2021, starting at page 25, line 13 to page 26, line 4." You then wait a beat or two to give the judge time to find that page in the deposition transcript, and give time for opposing counsel to interpose any objections. Please tell the judge whether there are any objections made at the deposition (on those particular pages) that need to be ruled upon *before* you read the testimony. You then read the deposition by saying "Question" at the beginning of each question, and you say "Answer" at the beginning of each answer. That's all you have to do. You *do not* read any objections made during the deposition (because objections are not evidence, and you have already alerted the judge to rule upon those objections).

Attorneys sometimes also say introductory things like: "Do you remember having your deposition taken? At your deposition you swore to tell the truth, right? Do you understand that lying under oath is a crime? I am now going to read from your deposition." This might be okay the very first time that you use a deposition at a jury trial, so that the jury gets the initial understanding that this is testimony taken under oath prior to trial; which is later reinforced by the standardized jury instruction. But this preparatory litany is completely unnecessary and a waste of time with subsequent witnesses, or in the context of a court trial. So skip it.

Rookies also say, "Do you remember that you said at your deposition . . . blah blah blah?" The witnesses almost *always* says, "I don't know; I can't be sure what I said at my deposition." It absolutely doesn't matter whether or not the witness remembers what they said at the deposition. They are telling the truth when they say, in front of the trier of fact, that they don't remember precisely what they said at deposition. By engaging in this introduction, you have just diluted your upcoming impeachment. It makes the witness sound sincere, and it wastes everyone's time. Juries and judges do not like their time wasted. So skip it.

After you read the deposition for impeachment, that's it! You move on to the next question to the witness. You do not need to say things like, "Did I read that correctly? Isn't that what you said?" The witness is not allowed to comment upon deposition impeachment, as there is no question pending – that is for rebuttal by opposing counsel. Impeach, and move on, without giving the opportunity for the witness to "explain." This isn't rude, it is advocacy, and the rules of the game.

Read the deposition testimony with inflection. Read it like people actually speak, not a droning monotone. On the other hand, don't read it like you are an actor doing a part, or with an exaggerated or strange intonation.

If you want to put a lengthy portion of the deposition into evidence at trial, i.e., three pages or more, you should plan to have it photocopied and ready to hand to the courtroom clerk to mark as an exhibit *or* hand to the court reporter so that the reporter has it available for correct transcription. This generally is the situation where the attorney wants to present a witness by deposition, rather than live. This applies whether it is deposition testimony read orally into the record, or deposition testimony played by video/visually to the jury. It

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is my general practice to require trial counsel to designate the deposition testimony prior to trial, allow any objections to that designation be made by opposing counsel, rule upon those objections, and then receive into evidence the designated deposition portions. Those portions of the transcript have to be photocopied and officially marked as a trial exhibit. (See CRC Rule 3.1115.) The Court then puts the designated deposition testimony in evidence. This absolves the court reporter from having to type that same deposition testimony into the transcript – it is already in the trial record as evidence, with no mistakes!

Train the junior trial lawyer as to what deposition testimony is actually admissible. Make sure that the junior trial attorney knows Code of Civil Procedure Section 2025.620 regarding use of depositions at trial, and related portions of the Evidence Code, to know when to properly use depositions. Is it admissible for any purpose, such as testimony of an opposing party? Is it only admissible as inconsistent with trial testimony? It is actually "inconsistent"? Does the answer contain inadmissible hearsay?

Effective use of depositions is a key skill for all trial attorneys, and a necessary component of mentoring junior trial lawyers.

[*Next time: Get Dressed Before You Come to Court]*

Hon. Marie S. Weiner (Ret.) served on the San Mateo County Superior Court from 2002 to 2024, most recently as the Civil Supervising Judge. Judge Weiner also served as the designated Complex Civil Litigation Judge for 11 years. Judge Weiner is a member of the ABTL Northern California Chapter Board.

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Do's and Don'ts with Does

180. Accordingly, Plaintiffs should spend time up front investigating potential parties and update that investigation as additional information is obtained during discovery.

Do Use Required Language in the Complaint

Counsel should make sure that the original complaint contains adequate language regarding fictitious Defendants that will meet the requirements of Section 474 later on. In that regard, the Complaint should clearly state that Plaintiff is ignorant of the true names of the defendants sued by the fictitious names and that the names are fictitious. *Kerr-McGee Chemical Corp. v. Sup. Ct.,* 160 Cal. App. 3d 594, 598 (1984). In *Kerr-McGee,* the court determined Kerr-McGee Chemical Corp. could not be substituted as a Defendant for Trona Medical Clinic under Section 474 where the original complaint did not allege that Trona Medical Clinic was a fictitious name and that Plaintiff was ignorant of its true name. *Id.*, at 597-598.

In addition, the Complaint must allege that the Does were responsible for the acts complained of. *Winding Creek v. McGlashan*, 44 Cal. App. 4th 933, 941-942 (1996) (the allegation that "each of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged" and "proximately caused" plaintiff's damages, coupled with the allegation that each was acting as an agent for the others, sufficed to name the "Doe" Defendants.)

Care should be taken to make sure that use of a defined term "Defendants" in the original complaint includes the Doe Defendants. *Winding Creek,* 44 Cal. App. 4th 933 at 941 (The addition of "s" to "Defendant" in the charging allegations will suffice as long as the complaint does not limit the word "Defendants" to those sued by their correct names); *Scott v. Garcia*, 370 F. Supp .2d 1056, 1064 (S.D. Cal. 2005) (Where a party is not

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