



From Hon. Jacqueline Connor (ret.)



WOMEN IN THE TRIAL TRENCHES

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Looking at my pending retirement after ten years in front of the jury and twenty five years instructing and managing them, discussions about women in trial courts remains of interest, back then and maybe more so today. I confess that on the rare occasion when counsel table is “manned” by women on both sides, I notice..... and enjoy the noticeably altered dynamics. The Los Angeles Daily Journal had a timely article recently on October 17, 2011 by Sally Phillips and Bradley Boyer, called “Forget the Glass Ceiling, Take the Elevator Up.” This article triggered a troubled response from a woman who wrote back in a letter to the editor that the article was no more than a thinly veiled piece of advice that women would be more successful if they just acted like men. The tips for women provided in the article were, among other things, to stop apologizing, know yourself, promote yourself, radiate confidence, set boundaries, be fearless, work from strengths, and find/be a mentor.

The interesting aspect of the tips in the article is that they apply to both men and women trial lawyers (except for one additional part I did not include discussed in the article, regarding emotions.)

Are men and women different? Despite what various intellectuals dating back to the 60s proposed, our differences are palpable and we disregard them at our peril. Typical traits on both sides of the aisle can be plumbed for their advantages or ignored to their disadvantage. Starting with the tired concession that yes, everyone is different, there clearly are characteristics that apply across the gender lines whether we embrace them or deny them. If you have any doubts, have a child. Case closed.

I have seen successes and failures by men and women who fail to use their strengths and who adopt strategies they learned from a trial course or “master” that simply did not and could not work for them. I have seen attorneys, men and women, step all over their opponents (and themselves), to their own detriment, believing that their show of power and strength was effective. Sometimes, rarely, it can be. Usually the attorney becomes his or her own worst enemy.

Litigators and trial lawyers are not the same. Trial lawyers are the justice system’s gladiators. They are the fighters in the ring. “Litigators” are more commonly seen as the people doing the paperwork, motion work and preparation before the jurors enter the arena. These are two completely different animals. The observations I offer relate to trial lawyers, where the ability to relate to people and to tell a story, show up most clearly.

Some men and women are suited to and relish the challenge of working on their feet, of taking on the task of creating a world that can change question by question, witness by witness and to weave the whole into an appealing and compelling package. Not all do and not all should. Many are not equipped with the nimbleness required to be a really good trial lawyer. Some cannot manage the need for flexibility and

ability to shift on a dime, and the need to be able to read jurors. I have seen some oblivious to these needs, and I marvel that they have chosen a field for which they are so ill-suited.

One example comes to mind. Since starting on the bench, I have invited jurors to submit written questions to the lawyers during the trial. Though this was new back when I started, this is fairly common now and in fact has been incorporated into Rule of Court 2.1033 (effective January 2007.) Every once in a while, a trial lawyer would object that this would destroy his strategy. (In twenty five years, I have never seen a woman make this objection, so the gender is used deliberately.) I am always astonished at such an objection as I have always considered juror questions as priceless gifts to trial lawyers, giving them a golden opportunity to correct a misapprehension, reshape a bias, respond to a concern by the ultimate decision maker, or get a glimpse of what the production looks like from the other side... before it is too late. Not hearing the question, which happens when jurors are not permitted to articulate their confusion, concern or problem, does not make the issue go away. Rather, if the attorneys don't get to answer the question, the juror will readily do so without input from the advocates. Having a chance to know where jurors are perhaps going off track or finding out what might be distracting them and being able to weigh in, is a valuable advantage. The objection to juror questions suggests an approach to trial that is imminently short sighted. It reflects a fixed plan that will be rolled out come hell or high water, regardless of its effectiveness or persuasiveness. There are many trial lawyers with this trait, and if they win, it is too often in spite of themselves.

I have seen both masculinity and femininity played to great success as well as miserable failure. The best trial attorneys, in my view, are not the pitbulls but are, invariably, gentlemen and gentlewomen. It is clear to me that the best trial lawyers project integrity. They are liked, by jurors, judges, court staff and their opponents.

In talking to a number of women about their experience as trial lawyers, there were the expected tough stories about being treated with disrespect and dismissiveness. They came most often from the private sector and the stories tended not to be very recent.

Not seeing what happens outside of the courtroom, I cannot speak to comments about women not being treated equally by clients, colleagues, or bosses. Once in the courtroom, male and female attorneys make or break themselves. There are as many advantages as there are disadvantages to either gender, and the smartest trial lawyers minimize the downside while riding high on the upside.

Certainly there are far smaller numbers of women represented in the unique world of trial lawyers. This is not startling due to the very tough and exacting demands of this profession. When in trial, the commitment is 110% and the work is all-consuming. A trial lawyer is not in trial just during court hours. It is a 24-7 operation, if not in body, certainly in spirit. With traditional responsibilities of children, family and home undertaken by women, the demands of such an unrelenting schedule are virtually impossible to manage. To the extent that no woman or man can "have it all," the balancing of costs makes it completely predictable that there would be fewer women in this arena. This is neither bad nor good, but perhaps reflects a healthy perspective on what one deliberately chooses in life.

It may also be that women are more traditionally averse to frontal confrontations and are more skilled and

comfortable taking a case to successful resolution short of trial. Jury trials usually result in a winner-take-all ending. The losers (and often the winners as well) turn out not always happy with “justice” as defined for them by twelve strangers who did not quite see the picture as either party saw it. In “real life,” outside of the kabuki staging of the trial, there are generally some good points offered by both sides. Jurors are usually permitted to pick only one.

Also, the difference between the civil bar and the criminal bar reflects an immense divide between the approach and attitudes of trial lawyers. The criminal bar is comparatively small. A criminal attorney on either side destroys his or her own effectiveness if s/he gets a reputation for shading or evading the truth. “Jackets” last forever and getting a “jacket” or bad reputation means that everywhere you go, you are bucking up against a system that will no longer give you the benefit of the doubt. As a client, it may be great to have your attorney burn bridges for you and hold nothing back. Such a strategy, however, destroys an attorney’s effectiveness for future clients when the same lawyer has to go back over the charred and shaky bridge they torched. It is also not worthy of an attorney’s status as an officer of the court or as a counselor. A counselor gives the best professional advice possible, and that includes bad news and saying no. The civil bar is so vast, compared to the criminal bar, that the likelihood of seeing the same lawyers is far smaller. Though the bridge being burned may not have to be crossed in the future, reputations are still made or lost, and this carries a price.

The size of the criminal bar has therefore kept criminal lawyers more forthright and civil than the civil bar. Civil lawyers far too often brutally denigrate each other, send blazing diatribes in various forms, fight over innocuous calendaring issues or discovery items or otherwise expend energy on small blazes, while unknowingly sacrificing themselves in the war. No judge likes to see the inflammatory exchanges that invariably get attached as exhibits in warring motions. It is far more common to see this with male lawyers than with female lawyers but the dynamic is something that is uncomfortably too common.

I recall in my first month in civil, I drew the trial lawyers aside during a recess when the jury was deliberating, and I asked them their views on whether the best trial lawyers started out with integrity and grace, or whether these lawyers had the luxury of integrity and grace once they had achieved professional success. I believe the former is true. The most effective lawyers do appear to start out with integrity and rise to the top because of it, not in spite of it. I was surprisingly impressed, I recall, with one particular incident in my court that spoke volumes. As all attorneys should know, their antics in the courtroom when the judge is not on the bench are relayed back to the judge. I had one such instance when one side was obnoxiously demanding and unreasonable about something. The opposing attorney, a female trial lawyer, refused to rise to the bait and calmly and firmly repeated her position regarding whatever the issue was. Only after the matter was called and completed did my staff tell me about the obnoxious behavior. Of great surprise to me, after the fact, was that the female attorney could have said something. She could have complained or advised me of the “problems communication with opposing counsel” or some other standard euphemism for offensive behavior. To her great credit, she never said a word. She never criticized him or his positions and the issue was simply never raised. To this day I remain impressed and remember her as a real professional. This did not relate to her gender, but did relate to the grace and integrity that show up in the best of the best.

So, in finding that I am rambling a bit about good trial lawyers, I can start out with the best qualities of

trial lawyers, then comment on how typical feminine traits either work for or against these qualities.

The best trial lawyers are always themselves. They appear genuine. They behave the same in front of the judge as they do in front of jurors, opposing counsel and court staff. They don't put on a different persona or attitude. They are the same at a social function as they are in a courtroom.

The best trial lawyers are unfailingly courteous and well prepared.

The best trial lawyers successfully convey their absolute belief in their client, while at the same time are the first to acknowledge their clients' human failings.

The best trial lawyers never stop paying attention to their jurors.

The best trial lawyers are the best story tellers.

The best trial lawyers own the courtroom with their voice and presence.

The best trial lawyers have mastered the evidence code.

The best trial lawyers get their hardcore fighting done in advance of trial, through in limine rulings, stipulations or other strategies that resolve the sticky problem areas in advance. Jurors see nothing but courtesy and calm.

The best trial lawyers know that every item of evidence presents both an opportunity as well as a problem. There is virtually nothing that, in skilled hands, cannot be turned into either a weapon or a shield.

What are the characteristics that jurors don't like?

The worst trial lawyers pay no attention to them.

The worst trial lawyers give away their credibility with unreasonable positions and stretches of common sense.

Jurors are cynical and suspicious. It is clear from dealing with thousands of jurors that they do not believe that the attorneys will give them the whole story. As a result, they constantly search for cues and clues between the lines to find the "truth." If anything confirms that a witness is lying, or an attorney is trying to sell something that is false, the fight is virtually over. Unfortunately, jurors tend to assume the worst and act accordingly.

How does this play out with women trial lawyers?

Genuineness and feeling comfortable in one's own skin comes more with maturity than with any gender. It is not as common to see younger trial lawyers able to project the kind of sincerity that compels jurors. This generally applies to both men and women.

Courteousness and politeness appear to be more common with women trial lawyers. It is rare to see the kind of discourteous behavior that flares up between counsel initiated by a woman, but though rare, it does happen. This may well be part of characteristics of women as traditional caregivers and nurturers, of good listeners tuned into the emotional dynamics of relationships. Women's traditional aversion to conflict may also account for the greater appearance of courtesy and attention to smoothing interactions between themselves and their opponents as well as with jurors, witnesses, and the judge. Women also tend to pay a little more attention to court staff than male attorneys, which is always a plus that reaps benefits.

Being well prepared is even across the lines. There is nothing more painful than to watch an unprepared attorney flounder with missing exhibits, lost deposition transcripts or last minute objections to devastating opposition evidence. Jurors forgive such lapses once, but rarely thereafter.

Conveying belief in the client's cause is also even across the gender lines. This is reflected more as an attitude than a strategy, but you know it when you see it. When it is not there, it shows up as well. I have seen more men caught up in the operations of the trial than women, as in situations where they are seen being somewhat rude to their own clients who might be inadvertently interrupting them to ask a question or offer a suggestion at counsel table. Jurors notice.

Paying attention to the jurors is a common failing of both sides. In my experience, trial lawyers who are best at this invariably tend to have been trained in the criminal sector. While paying attention during voir dire is obvious, too many trial lawyers forget all about their finders of fact until they present their arguments. This is often fatal, as jurors provide information throughout the trial. It does not take great sophistication to discern whether jurors are tired of the repetition, caught up at the edge of their seats, taking notes (or abandoning all note taking), taking leadership roles or tuning out. If a lawyer has lost his audience, it matters not how brilliant s/he thinks s/he is.

The best story tellers seem to be the most prepared. They have their client's case pared down to a theme, a story. This crosses both gender lines.

Owning the courtroom with voice and presence tends to be a weakness of many women trial attorneys. The quality of voice makes a surprising difference in keeping jurors engaged. Tired jurors pick up with the energy of a vibrant voice. Soft voices of either gender can be a disadvantage, and this tends to be something more common with women because of naturally softer voices. Women should be able to use this as an advantage if the softer voice is always calm and in control. I have heard experts in the field of psychology and psychiatry refer to the resistance felt by people when women's voices get loud and shrill, reminding them of their mothers "yelling" at them. The shift from being too quiet to being loud and firm enough has to skirt the potential for sounding shrill.

The impression of a commanding presence deals with the projection of one's confidence. Everyone can recall the experience of watching an actor or speaker on a stage or on the screen where one cannot take their eyes away. That "something" is in large part the skillful projection of confidence.

Both of these qualities, presence and voice, can be achieved and/or improved with thought and practice. However, if the quality is one that is not quite “real,” the danger is that there may be moments when the mask is dropped and jurors will see the real lawyer behind the image.

Vulnerability can be extremely appealing to jurors, when it is owned. Trial lawyers who drop something or get caught midword or midstrategy with an obvious miscalculation or mistake, can win jurors’ sympathy and support by acknowledging the error or miscalculation with some humor and moving on. This ability not to get stricken with embarrassment or to be thrown off stride comes with maturity and genuineness, qualities available to both genders.

Mastering the evidence code unfortunately tends to be rare, and is seen most often with trial lawyers of either gender who were trained, too often, in the criminal sector. Experience with the rules of evidence includes knowing when not to make an objection, or at the very least, making them infrequently and only when it serves a real purpose, such as protecting your witness. Peppering the other side with objections that may be valid but achieve no real purpose other than to rattle the opponent is not well received by jurors. If anything, they often engender sympathy for the lawyer they see as trying to get information to them while the other side is trying to hide the information from them. This is not a good place to be and I see this form of aggressiveness more often with men. Anyone watching a trial between real masters of the art will see very very few objections. That is, in large part, because they have done the rough-and-tumble work behind the scenes through in limine motions and advance rulings when the issues can be addressed cleanly with no jurors waiting.

Appearance is one that creates a unique problem for women, since there is no standard trial “uniform” that works. Men can wear a good suit and with good grooming, appearance is a nonissue. Women? Unfortunately because of the freedom women have to wear different types of clothing, focus on dress and appearance comes to the forefront more often. The bottom line is that a trial lawyer’s appearance must always be professional. In addition to simple grooming, this means nothing tight, no bare arms or legs, no dangling jewelry, and nothing higher than a medium heel. Can women do well with more flamboyant clothing? Of course, just as men might. The danger of offending a juror who might or might not appreciate panache should be enough to curb looser standards. Clothing should never hit the jurors’ radar screen other than to create the impression of confidence, competence and experience. It should be a nonissue and flash rarely works.

Ultimately, if one were to examine the top 25 trial lawyers in Los Angeles, there is a strong feminine presence. Do women need to be “more like men” to do well with juries? Absolutely not. Can feminine characteristics be an advantage? Absolutely. Can we be our own worst enemy? Aren’t we always?

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From Hon. Jacqueline Connor (ret.)



IF I HAD MORE TIME, COULD I MAKE IT SHORTER?

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One of my favorite writers is Thomas Sowell. Whatever he writes I understand, even if I don't agree with him. Most often he makes so much sense and his points flow so naturally that his conclusions become unassailable. Examining his writings create an interesting exercise in the art of persuasion. He uses many of the techniques that are powerfully effective in the courtroom. He tells stories. He harnesses anecdotes. He connects his concepts to common values. He speaks in simple concepts to explain more complex ones. He uses real people and real experiences. He connects the dots. It is very simply all about effective story telling.

Every once in awhile, he will write an article or column that he simply calls "Random Thoughts." These are often the most enjoyable, untethered to any one point.

I have decided to borrow from such a master and approach this piece as my version of random thoughts on the art of final argument, the good and the bad, the mistakes and the bright spots.

Stephen Bochco's late eighties television series *LA Law* had the best arguments...all delivered in less than five minutes. Though it was "only television", these arguments were focused, lean, mean and effective. I would go into court almost daily in those days and cross my fingers hoping that I might get one of the those five minute firefights, but it almost always turned into hours of rehashing.

Operating from the premise that final argument is clearly an art and not a science, it follows that there is no single perfect way to approach the craft. There is no single "best" argument, no silver bullets nor surefire approaches. It is also terribly important to remember that lawsuits are human problems redesigned by legal experts to form artificial legal causes of action. Underlying every legal and technical factoid is the original human problem.

My first random observation is fundamental and a cornerstone of effective trial preparation. Never wait for the trial to gear up to start thinking about your argument. Actually, the best time to write it out, to structure it, is when you decide to take the case, and as you prepare. (It also makes practical sense to pull the jury instructions at this very early point. The instructions provide a focus and outline for what has to be developed and established.) After blocking out your argument in the beginning, pop things into an argument file through the life of the case, ...analogies, quotes, events in the news...all of which can feed the theme of the human problem that walked into your office. Once you structure the legal chassis, you have your work cut out for you. Every deposition, every examination, every interview, can be effectively geared to collect the building blocks to deliver that final argument. Needless to say, none of this suggests that the structure shouldn't be reevaluated or that you are wedded to that original architecture. Things do change and what looks like a lion when it walked in the door may well be a whipped puppy. Nevertheless, this approach will save wasted energy, time, money and focus. It may also make it clear if you need to let that puppy go.

There are no guaranteed styles that will always work for every trial lawyer. A style, whether loud or soft, aggressive or humble, detailed or broad, fast or slow, gracious and polite or furious and relentless....may look great on someone else but may simply not work for you. An adopted style that is not natural is painful to watch. It is akin to seeing someone wear an expensive ill-fitting jacket with the sleeves too short or too long and the shoulders drooping. It distracts, and it looks like it belongs to someone else. In fact, it does.

The only certain variable is the trial lawyer's personal credibility. If lost, nothing else much matters. Jurors' trust and a lawyer's credibility are priceless and should be protected as the most valuable commodity the lawyer brings to the jury. This currency can be lost by misstating evidence or by sloppy presentations, by disrespecting a witness a juror likes, or disrespecting the jurors, by being late, by talking down to the jury and insulting their intelligence, by repeating interminably, or by boring the jury with unrelenting details. The list is endless.

Experts sometimes claim that jurors have already decided where they stand long before arguments are presented. That has not been my experience from three plus decades in the pits. I have had hundreds of jurors explicitly tell me that this was not true for them. While they may have leaned one way or the other, it was not at all unusual for them to switch camps. Rather, they tell me, the dynamic that swayed them most frequently were arguments made and perceptions revealed by their fellow jurors during the give and take of deliberations, not what the lawyers said. They already knew what the lawyers were going to say.

There is power in this view. Final argument can be used to provide jurors with the support they need to persuade those who might be against you. Fellow jurors can be more persuasive than paid advocates. They have no skin in the game. They use their own words and experiences. There are therefore two goals that litigators should keep in mind in terms of what they hope to accomplish with their argument: to persuade those jurors who may still be on the fence, and to arm those who are already in your camp with arguments to help them counter those who are not in your camp.

Parenthetically, jurors have told me frequently how unsettled they were to find that other jurors had completely different views of the evidence that had seemed so clear and obvious to them. As a result, for years I included an admonition prior to argument, that jurors may find themselves shocked and upset at some point during deliberations because the story that they thought was so obvious may not have been as obvious to others. This warning seemed to prepare them for this inevitability.

Every trial is like a Rashomon play...different sides describing the same set of facts, with at least two versions of the same story. How that story is framed, how the theme is presented in its simplest form (the human problem,) often dictates the success or lack of success of trial advocacy.

Don't even think about telling jurors everything you know. Just tell them what they need to know to get to the result you are working to lead them to. This is so important it is worth repeating. Don't tell them everything you know.

Although the scope of this article does not include trial strategies, it is helpful to comment on the great value of summary trial statements. Try to get the judge to give both sides a bank of time, perhaps as little as ten or fifteen minutes each, to be used at will, broken up as frequently as desired up to the maximum allotment permitted. These minutes can be used to summarize the case to that point. This does not and should not qualify as argument, but serves as a summary reminder to the jurors of the significance and context of what they have been viewing. ("This is where we have been and this is where we are going. My next witness is going to talk to you about....") Putting the trial into context in the midst of the presentations will keep jurors grounded, will help you keep the final argument focused and will control

the impulse to restate and re-ask what was already covered, such as after a long weekend or a break in the natural progression of the trial. (This promise of a reduction of repetition is a strong selling point for the trial judge!)

Don't tell jurors why they have to do something. Show them why they want to. Figure out a way to make them want to adopt your framework and let it be their conclusion. They will defend that position much more strongly and use it in their own words to persuade other jurors during deliberations. Jurors, once engaged, are almost always committed to figuring out what the right result is and then doing the right thing. Acknowledge that and then show them why the right result is to find in favor of your client, giving examples that inexorably lead to the conclusion you are building towards. Ordering them or demanding that they come to a particular conclusion is just as off-putting as it is when we are ordered to do something by someone in our lives. For instance, instead of saying "Mr. Jones has no integrity and can't be believed," give examples. Small ones count. "Mr. Jones was wrong on his times. He was wrong on what he was doing the day before and the week after. He tried to make you think that And if Mr. Jones would stoop to such depths when it doesn't matter, how much more likely is he to sell out his integrity when it really counts?"

Or... instead of saying "Campbell Horn was an outstanding employee," lay out the proof and let the jurors figure out how exemplary Mr. Horn was. For example, this could be approached in this fashion: "Campbell Horn was always on time. He never took a sick day, he stayed late every time he was needed, he helped others when it was not his responsibility, and he was a solid team player the day their big client came into town and Vice President, James Smith, had to leave on an emergency..."

The most complex and difficult concepts can be presented with familiar metaphors and anecdotes. Give the jurors enough universal values reflected in your theme to allow them to understand it so that they can talk about the issues in their own words.

Anecdotal stories are always more compelling than cold statistics. Come up with an analogous comparison in everyday terms. For example, "if you knew that your brother in law had bought this new alarm system for he and your sister, and they were burglarized because of a glitch in the system, would you buy the system? If you were told that it was 99% failsafe, would you reconsider? Of course you would not!" Start with the anecdote then back up the message with your statistics and studies. Don't start with the stats.

Keep your argument as tight and short as you can. Various studies point out the limited attention span we seem to experience in our culture. This attention span seems to get shorter and shorter with our younger generations. In defiance of this truism, I would be rich if I had a dollar for every time a lawyer announced that his argument would be a perfectly reasonable 20 minutes or 45 minutes and the presentation was still going strong a couple of hours later. Lawyers often tell me they were shocked at how quickly that time went by. I guarantee that the time did not move as swiftly for the captive jurors. This is a disconnect that should not happen and is the mark of inexperience.

In keeping with this, trial lawyers should always pay close attention to the jurors. Valuable information is available from body language: rolling eyes, uncomfortable shifting in seats, bored attendance and the lack of (or vigorous) note taking.

Our younger jurors are accustomed to visuals and flash bang excitement in the information they pay attention to. Using well-made and thoughtful visual exhibits and displays can make an important difference, both in keeping their attention and in explaining concepts.

If visuals are used in argument that have not been marked as exhibits, it is helpful to let the jurors know that a particular exhibit will not be coming into the jury room with them. This will alert them to take notes if want to remember the substance of the exhibit.

On the other hand, don't commit death by powerpoint. Too great a reliance on powerpoint slides and unimaginative lists can create as solid a barrier as hiding behind the podium or reading the argument.

In this economy, many jurors are struggling mightily to survive. There are also many who live or have lived in pain, or experienced losses sometimes worse than that described by plaintiffs. Trial lawyers will ideally have learned this information in the course of selecting the jury. It is helpful to review these details when choosing how to fine-tune the argument relating to damages and liability issues, and in the decision about what to ask for or what to concede.

Be aware of the generational differences among the jurors. This was reflected in stark contrast in a litigation exercise conducted for a law firm many years ago. The identical factual scenario was presented with attorneys switching sides. The recruited "jurors" in the morning were retired people and the group in the afternoon were college students. The older "jurors" were uniformly impressed and persuaded by the credentials and depth of experience of the "experts" and generally adopted their positions. The college students totally disregarded experience and resumes, tending to go with the "expert" they liked and could relate to. This dynamic should not be ignored.

Speak English. There is something about law school that strips the commonsense out of us. We are professionally trained to plug every hole and use every adjective imaginable to make sure nothing leaks. This may be fine for a legal document or contract but it doesn't work in communication and persuasion. A party's story is most effective when framed in the easiest way to be understood by the least informed juror on the panel. It is a rare complex issue that can't be broken down into simple concepts of greed/responsibility/innocence/guilt/good/bad. Also, for example, who "exits a vehicle?" We get out of our cars!

Never ever read your argument, no matter how good you sound on paper.

Prepare and memorize your opening and closing sentences. Don't script the rest. All points you want to make can be noted with bullet point reminders. The opening and closing sentences should be visceral attention getters.

Beware about underestimating juror cynicism. Many jurors assume that lawyers are hired to lie and deceive. They assume your experts are hired guns. It is not a surprise that lawyers are not generally well regarded in our culture. It helps to address this directly and defuse it by acknowledging and addressing it with humor and humility when the trial starts. It is also a reason to remember never to lose the trust of your jurors by exaggerating or leading them astray on even a small fact or issue. There are rarely second chances.

Jurors are influenced by what may seem to be trivial things.... the choice of words used by a witness, the clothing they wear, the car they drive into court in, whether they have an agenda, whether they seem to have compassion for the aggrieved parties even if they are not responsible. Jurors do pay attention to whether your client cares. A party's absence, for example, screams to them that the party doesn't really care about the dispute even as uninvolved citizens are dragged into jury duty without their consent, to serve as fact finders and judges. Pay attention to these small items with your client and your witnesses. Since jurors are not allowed to talk about the case, they will talk about these other things. One example comes to mind in a trial a few years ago. A witness was describing a meeting with one of the parties in the

case, referring to the meeting as an “audience.” This imperial description shed a whole new light on the way the client did business, and it was not positive. In another premises liability case involving a fall, the plaintiff wore high platform shoes the first day. She lost the trial that day. In yet another example, a juror saw one of the parties talking on his cell phone while driving away from the courthouse during the lunch break. He also lost that juror that day.

Your case has weaknesses. All cases do. It helps to address them directly and early in argument. Get them out of the way. This dissipates the likelihood of jurors rejecting your witness/client/expert, and lets you emphasize how those weaknesses don’t detract from the universal values of the human problem at stake. Ignoring your weaknesses also hurts your credibility. Any decent trial lawyer should be able to turn a weakness into a strength. Every blade is double edged. For example, inconsistencies in a witness’s testimony can be used as support for its veracity. Nothing in nature is ever totally perfect or consistent. In fact, the argument can be made that the flawless witness should be looked at with a little more skepticism. Life is never that clean or perfect. It just isn’t. Jurors know this.

It is also quite effective when you start with your weaknesses, to acknowledge and reframe them, then dismiss them with a “but.” “But” negates all that precede it. “Susan Strong did lose some of the documents that support her statements, but she deserves your full attention and sympathy because....”

Ideally the jurors have been admonished clearly and regularly about the prohibition against using the Internet to research, communicate or discuss anything related to their jury service. Argument would be a good time to remind them of this prohibition and to let them know again that if they have a question, they should submit them to the attorneys to address. Argument is a good time to remind them about the foundation of simple fairness that underlies our entire system of justice, and that the use of information that might influence their decision that has not been vetted, explained, corrected, presented to or acknowledged by any of the parties serves to destroy the integrity of trials.

Let the jurors know you trust them to come to the best, most wise decision, on behalf of your client as well as the other side.

Keep the level of civility high, no matter how low the other side might stoop. If the other side does degenerate into personal attacks, recognize and accept the gift that is being given to you. Don’t throw it away by responding in kind. The contrast between the sides will inure to your benefit. If you are aware that opposing counsel tends to throw out objections during argument, often to simply disrupt your concentration, consider making an in limine motion in advance, or alerting the judge to your concern about this practice. Likewise, objecting to the opposing argument should not be done unless serious irreparable harm is contemplated. If there is concern about a particular improper argument that might be delivered, handle this in advance through an in limine motion or by alerting the judge. Objections, for the most part, are lose-lose propositions when handled in front of the jury. Even if the objection is sustained, jurors wonder what is being kept from them and what you are afraid of. If your objection is overruled, you are a loser. Jurors don’t like objections during argument. They are disruptive and too often come across as gamesmanship. Considering offering to stipulate that objections made in advance (ideally before the trial starts) outside the presence of the jury, be deemed to have been made during trial to avoid the need for repetition, preserving the issue for appeal if necessary.

Make sure your client has a face that the jury sees and, hopefully, likes and can relate to. It is easy for a jury to demonize a bureaucracy or institution. It is not easy to do the same with flesh and blood sitting in front of them, especially if they like that flesh and blood.

Don’t lose credibility by setting your numbers too high or too low. Being too greedy or too stingy can be

killers. In mediation, much time is spent (or should be) on the opening numbers, since these numbers will generally anchor the discussions. These anchor numbers often become a starting point...or a stopping point if they are unrealistic. Except in rare cases, jurors often negotiate down from the high number suggested by the plaintiff, and up from the low number offered by the defense. If those numbers are unrealistic and unreasonable, the attorney offering that number loses credibility. Choosing the optimal number may be one of the most important tactical decisions made by the litigator. The more credibility that has already been built up and “banked” during the trial, the more that number can be pushed, but only to a point. I have found many jurors primed to make sure they are not a “McDonald’s juror” though some have seen the HBO television movie “Hot Coffee” (which might be a good question for voir dire.)

Numbers offered should be backed up by the evidence produced during the trial. It doesn’t seem to help to have a number not grounded in some kind of justification based on the evidence. Random numbers won’t help jurors persuade each other. Numbers anchored to evidence or a reasonable argument, even for noneconomic damages, are more compelling. Doubling the economic damages to support noneconomic damages is an example. Lawyers often refer to a “rule” that general damages should be a significant multiple of special damages. I have been told this time and again and have simply never seen it happen in the real world.

For general noneconomic damages, many lawyers effectively use the technique of providing a reasonable value for the pain and suffering experienced on a daily basis, provide information about life expectancy, and leave it for the jurors to do the math.

A number that is not rounded is often more credible. For jurors, \$462,000 sounds more thoughtful than \$400,000 or \$500,000. The number starts to sound petty, however, if it includes pennies.

Try to see your client and your case from the perspective of your specific jurors. It is helpful to try to understand your jurors, but don’t even think about getting it completely right. No voir dire ever conducted can produce enough information to solidly predict juror responses, whether by professional consultants or lay observers. Even if weeks were devoted to jury selection, it doesn’t mean that predictions are much improved. I have not talked to a judge yet who did not agree that in virtually every trial, the lawyers, parties and court staff were surprised by a juror who voted or behaved contrary to initial evaluations or voted against type. Lawyers regularly find their cases being championed by a juror they were convinced hated them or their client, or were destroyed by the lead of a juror they thought was in their camp.

Once you have a feel for your jurors’ perspectives, find a way to talk to them in terms of their problems, concerns and values, and couch your client’s problem in a way that is familiar to theirs. For example, “Many of you told us you have kids getting ready for college. We all struggle with the problem of paying for school, figuring out where they should go, and keeping them close to home but not too close.... Susan Bowers here will also have that problem, but her plans for protecting her kids and projecting for their future have been crushed.”

Be cautious, though, that jurors are not inadvertently offended by the presumption that you know what they think or feel. It is more subtle, therefore, to refer to a generic “us” or “some jurors” when incorporating what you believe are their perspectives.

Determining who the leaders and followers are, and watching the natural leadership that develops during a trial is important information in shaping the final argument and deciding to whom it should be directed. The most valuable pieces of information potentially available during voir dire and to keep in mind when delivering the argument is to learn who are the leaders and who are the sheep, how they gather information, what their personalities are and how they view the world (i.e. corporations are evil vs.

corporations keep our economy pumping.) It makes sense to spend sufficient time to design arguments to persuade or arm the leaders on the panel.

Try to figure out what a juror might ask as they sift through the evidence. Articulate that question for them, then suggest how they can answer it. “Some of you may be wondering what in the world you are going to do with these stacks of exhibits? You are free to look at every single one and I suggest you spend all the time you need on them, but I think you will find that the most important ones that will help you are.....”

Walk jurors through the verdict form. It is distressing to see how infrequently something this basic is ignored. Jurors often view the verdict form as their final exam. You might want to acknowledge that jurors have, in the past, indicated that the form felt like a final. Offer to make the form more clear for them. Explain that the foreperson will sign it, that they need to answer the questions in the order the questions are posed, though as the jury instructions dictate, they can talk about the issues in any order they like.

Walk them through the most critical pieces of the jury instructions. The operative word here is “critical.” (I have come to believe that a best practice is to give the jurors the complete and full set of instructions right at the beginning of trial, with copies for them to read along, make notes on and refer to during the trial. These instructions will have provided the jurors not only with the elements of the causes of actions, but also guidance on dealing with deposition transcripts, expert witnesses, and so on. This gives them direction when it is needed and not long after the issue is forgotten.) If at all possible, ensure that the jurors have been provided with their own copies of the jury instructions so that they cannot be commandeered by the foreperson or a juror with an agenda. Individual copies also allow jurors to make notes on them as you walk them through key language.

Let them know that contrary to every television show and movie, the foreperson will NOT have to stand and announce the verdict. This has caused many a capable leader from taking on the role of foreperson in fear of that eventuality.

Encourage jurors to stand up for what they believe. Let them know that it is important to express and listen to dissenting views. This will help avoid the problems generated by a vocal leadership clique dominating and silencing opposing viewpoints. The value and power of our jury system is truly grounded in the broad range of experience and viewpoints brought by twelve randomly assembled human beings. Jurors have consistently told me that they were amazed (and sometimes shocked, as noted above) by the different perspectives brought into the discussion, perspectives that never dawned on them individually. The presentation of alternative viewpoints usually tends to animate the discussions and draw everyone in. Jurors can and should be reminded that the reason group decision making is superior to individual decision making is because of the value of different perspectives examining the issues.

Make eye contact.

Move around periodically to keep the pace flowing and to keep jurors’ attention. Parking and hiding behind the podium is never a good way to connect with jurors. Use your space with your body but don’t invade their space by getting too close to them. I have heard six feet is as close as you “should” get, but since the jury box already creates a “wall”, four feet seems to work. Don’t do what I have seen one lawyer do, which was to lean right into the box. (This lawyer was so spectacular in his inability to sense space that as the jurors were pulling back from him, he actually fell into the box. It was quite impressive.) Moving too much, rocking or pacing, is also distracting and signals a lack of discipline and confidence. Watch for personal tics or gestures that don’t match the words being spoken. It is immensely helpful to

deliver the closing argument in advance on tape and watch it. There will be small things that the speaker is often completely unaware of that are annoying, distracting or offensive.

Be enthusiastic but not rabid.

If you number your points, make sure your points add up. It focuses listeners to tell them there are three or four or five great reasons why they should accept the truth of a certain witness or why the opponent's expert should be disregarded. Using numbers will engage those jurors who like to take notes and keep track with numbers. However, if you say you have five points, make sure you give them five and identify what they are. Audiences become more attentive as they wait for the numbers to be delivered.

Ignore the natural impulse to answer every point raised against you. There are usually two many red herrings thrown in the mix. Chasing herrings will cut into the strengths of your case and you will lose your jury as you find yourself focusing on your weaknesses. You don't have to accommodate the other side in this strategy and you don't have to answer every challenge. If the jury likes you, they will figure out how to answer every one of the arguments. It can in fact be rather scary to see how creative they are willing to be. Pick and choose the few arguments made by your opponent you need to respond to, as they fit into your strengths.

On the other hand, as a strategy, it also helps to challenge the other side, to ask the jurors to think about why the other side has not explained X, Y or Z. If you can draw them into responding to each of these, you have forced them to focus on their weaknesses.

Avoid hyperbole. Just set up the facts and let the jurors hybolate for you.

Don't call someone a liar easily. If you decide to take this aggressive step, understand that this is what you are doing and make sure you have plenty of hard evidence. It is more effective to claim that perhaps they were mistaken, or wanted to believe it, or they may have convinced themselves to believe it, or they simply were embarrassed and they were just covering themselves. Note that just because you may have proven something to be false, this does not automatically make that person a liar. Calling someone a liar is pulling out the heavy guns. There may be times where that is appropriate but you may lose a juror who liked that witness or party. The point is to have the jurors disregard the evidence that has been shown to be false. Whether the jurors then decide the witness is lying can be left up to them. If the witness's statement is based on his or her own point of view and you can demonstrate that the evidence does not support this particular point of view, this is all you need. Jurors, unlike lawyers, think that the oath to tell the truth carries some weight and they tend to be reluctant to determine that someone is a liar, though they may not be reluctant to find that a witness was mistaken.

Speak in positive themes, and avoid negatives. I have repeatedly seen experts claim that our brains see in images. You can tell someone not to think of an elephant and all you can see in your mind is an elephant. I recall first learning this concept when I took my dog to a training class. Dogs' brains, I am told, do not hear the "no" or "not" in front of the issue being discussed. "Don't bark" sounds like "bark. "Don't chew on the furniture" is heard as "chew away..." This concept was reintroduced to me when I was trying to figure out how to be a parent. "Don't pick up that vase" translates in the brain as "pick up that vase." Anything can be rephrased in the positive mode. "Don't be late" can translate to "I know you'll be on time." The same happens in the employment arena. "This is our most important client. Don't irritate them" sets up a visual of what "irritate" looks like. The same message in the positive might sound like "This is our most important client. You'll do terrifically as you handle them with sensitivity and confidence." To counter this phenomenon, do the same with jurors. Don't tell them what you don't want. Ask for what you do want. For example, the negative would be "Don't leave my client with responsibility

for what he did not do.” Instead, rephrase it ”Protect my client from these false allegations.”

Believe in your position or your jury won't.

Again, and it cannot be repeated enough, your credibility is key. It won't overcome weak facts but the jurors will try mightily to find a way to give you what you ask for. If they can't, I've seen them approach trial lawyers whom they like to personally apologize after the case.

Accept the inevitable that when you sit down, you will remember absolutely brilliant thoughts you failed to include. Forgive yourself. The jury will.

And take a serious cue from Bochco!

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From Hon. Jacqueline Connor (ret.)



WHAT ONE DAY ONE TRIAL MEANS TO YOU

(Are you paying attention?)

CAALA Advocate Magazine October 2007

Have jurors changed with the advent of One Day One Trial? Has the character of jury trials been altered? Did ODOT “fix” something that wasn’t broken?

In the view of at least this judge, I believe the change has been profound. I also believe this has been a good thing. One Day One Trial has altered the dynamics of jury service by its essential goal: everyone serves. That includes you. I personally do not believe that there has been a shift in the quality of verdicts, though I have seen no hard statistics. In my court, at least, when the facts support it, jurors give big. When the facts don’t, they are equally quick to drop the hammer. They can usually figure out the difference pretty accurately.

ODOT has, however, resulted in a shift in how one ordinarily does business. Or at least it should, for litigators paying attention. For those who are not paying attention, they fail to do so at their peril.

The transition to a one-day term of jury service began with limited districts in May 1999. The entire county was on board by May of 2002. We now have a history of almost five years at this point where every court has been impacted and any litigator doing a trial in the last five years has been part of this new dynamic. What is amusing to me is that five years seems to always work out to just about enough time for no one to remember how things used to be. This may be truer in criminal than civil, but I think it still fits.

For those who don’t remember, it was not so long ago that jokes were the standard of the day. The bottom line was that if one was too stupid to get out of jury service, then one deserved to sink into the bowels of the justice system. There were discussions on radio and television talk shows about how to get off and tips on what to say to avoid the dreaded obligation. Having fielded calls on such shows and taken questions from the public for over twenty years, there has been a refreshing change. Instead of steeling myself for the expected gauntlet of invectives and horror stories, I am now greeted with a flow of inspiring stories. Have I noticed a difference? You bet.

Some of us may remember when service was for thirty days. That was before it was reduced to ten days

then five days then back up to ten days. (If you don't know why this happened, don't ask.) These periods of service have nothing to do with the length of a trial, of course. The terms of service only dealt with the number of days people had to vegetate in assembly rooms and courtrooms waiting to see if they might get on a jury. Of course, anyone who made the slightest effort could get off with the flimsiest of reasons. Some of us remember when jurors were regularly recycled on one trial after another, with the latter parties being stuck with experienced jurors who had heard all the "stories" before and were less likely to be impressed by anybody, armed with their newly acquired cynicism.

As a trial lawyer thirty years ago, I remember the process of evaluating all the postal workers on the panels. Other than the unemployed and retired, they were usually the only ones who could stay and be paid, and many of them wanted to be there so they did not have to return to work. I recall when jurors would be ecstatic with short work days, long drawn out trials and Fridays off. It meant no work, for surely their service on a jury was not work. It was a reprieve. It was a vacation. It used to include lunches and other perks. Sometimes it included hotel stays.

Our system is far from perfect, even with the changes that we have seen with the alteration in the term of service and with all the ongoing efforts to improve the experience from the jurors' perspective. It is still the best in the world, and better than ever with ODOT. The biggest change is one that we all could have anticipated. People are serving who have never served before. The proportions have been completely reversed. I used to see about 10% of each panel comprised of new jurors. At the beginning of ODOT, I saw 10% veterans and 90% first timers. I see about 60 – 70 % newcomers with each trial even today.

With this has come the result that those of us who care have looked forward to. People's views of jury service are being altered, one trial at a time, one juror at a time. Those who don't serve have always been our harshest critics. Those who actually serve become our staunchest advocates. We are now getting more advocates. You are now getting more advocates! I am seeing an increase in respect for the system. I am seeing more confidence that the system works. I am also seeing a growing respect for trial lawyers and the value of the work they do. I am universally seeing recognition that things are not as simple as they look in the news. This is good for the justice system, and it is good for the legal profession.

Can I bore you with a few anecdotes from one court (ok ok, it is my court... didn't think I could fool you)? A partner in a law firm did his utmost to explain how busy he was, how he did pro bono work and served on the board of a law school plus had demanding clients and _____ (you fill in the rest.). After bombing with me, the trial lawyers unfortunately did not respect his wishes to be excused and

he served through the trial. After the verdict came in, he repeated his mantra, though not as vociferously. He should never have been made to stay yadayadayada. After some days had passed, I wrote a letter to him and asked him, with some time under his belt, whether his views had changed. He wrote back to me that his perspective on lawyering had indeed been impacted. He felt he was a better lawyer, a better mediator, a better trustee and a better partner, and thanked me for not letting him leave. Whew.

One newly minted citizen tried to get off service, feeling a lack of confidence in his ability to keep up. He stayed. After the verdict, as the jurors gathered for questions, he had us all nearly in tears as he spoke of his pride in having been part of the system, that he had been overwhelmed to have his opinions respected by the other jurors, and that this would never have happened in his home country.

One young woman who worked in a clerical capacity felt so empowered by her ability to hang in there with the big guys and hold her own, that she decided to go back to get a degree and get out there in the world she had been viewing from afar.

These stories are neither unusual nor rare. What is also not rare is the zeal and seriousness with which I see jurors approaching their task. They really want to know what is going on and they want to understand what is being presented. They really want to do the right thing.

Hence, the part about where trial lawyers really need to pay attention. Jurors do NOT want their time wasted. They do NOT want to get out early only to come back for a protracted trial. They do NOT need to hear information repeated ad nauseum, in case they missed it the first fourteen times. They DO want to start on time and end on time. They DO want to be able to see the exhibits. They DO need the legalese translated. They DO want their questions answered.

There is a lot we cannot give them. One very articulate and intelligent foreperson in a mega publicity trial of one our most celebrated corporate scandals, told me that he could not understand why, in this day of computers and high tech gadgets, he and his fellow jurors could not get a transcript of the hundreds of hours of testimony they endured. Some things will never be made available, but what we can provide and often don't, is simple respect.

What does that mean to a trial lawyer in 2007?

Give them the tools to do their jobs.

Don't be afraid to let them ask questions. Their questions are your friends! They are golden opportunities to address concerns or correct misunderstandings that otherwise will be left to their imaginations. You think you already covered it? Think again.

Don't repeat ad nauseum. The old wisdom was that if it was important, you needed to repeat it. Don't believe it. I repeatedly see jurors swarm to the side of the trial lawyer who asks what is needed, sits down and crafts what he got from the witnesses and evidence into a focused, hard-hitting argument. These are the lawyers who get asked for the business cards. Every time.

Flush out the biases and concerns right up front with miniopening statements. Give them your view of the case in the first minutes of the trial, before voir dire, so they know what is coming and know what will be expected of them as judges. Leaving the judge to give the sanitized statement of the case is bad lawyering. Having personally been a juror in some panels and listening to a few of those "statements", in each instance I had no better information about what the trial was about than when I walked in the door with the rest of the panel.

Don't waste their time. Don't run out of witnesses. Have your witnesses ready and waiting or work with opposing counsel and the court to switch orders if schedules can't accommodate the ideal chronology. Don't ever be late. Better to be late for the judge than your jurors.

Stand when the jurors come in and out. I have had many jurors tell me after a trial that they thought the plaintiff's lawyer or the defense lawyer respected them more than the opposition because they stood when they entered and the other side was otherwise distracted and did not notice.

Give them copies of the most critical pieces of evidence so they can see them up close and at the precise time that they are being examined by the witnesses and fought over by the attorneys. These can go into jury books, which are inexpensive and raise the level of professionalism of the whole operation when provided. (Only the most critical pieces. You can do more damage by giving them too much extraneous paperwork. Most won't look at them or some might flip through and misread a juicy tidbit out of context that can destroy all your best efforts.)

Make sure they have their own copies of the jury instructions so they can read along when the court recites them. We know that people learn at different rates and in different modes and we know that multiple forms of information increase rates of comprehension. Having them read along will make your job easier, and will also allow you to refer them back to the choice words that are most helpful to you by

directing them by page and paragraph in your argument. Seeing it in black and white is understanding. Jurors often report back that having their own copies gave them the opportunity to review what may not have made sense initially, and also let them reign in the occasional juror who wanted to go off in a direction none of the parties anticipated.

Unless there are no alternatives, make sure that the judge does not leave the jurors out in hallways. Many cases are lost, totally unbeknownst to the parties, because of an inadvertent observation by a juror. In one premises liability case, the defendant was seen tossing the wrapper of a piece of gum on the ground outside the courtroom. To the extent that evidence was presented of carefully monitored safety practices, none of it meant anything. The case was over. This could happen to either side at any time. You'll never know. Don't let it happen.

If the trial is a long one, or has a significant break in the middle (such as with a three or four day weekend), ask the judge give you a chance to bank some minutes for interim summaries. These are not arguments. They are chances to let the jurors know where you have been and where you are going. They will eliminate the urge to repeat everything that was presented before the break. (That will be your winning argument with the judge. Trust me.) If interim summaries are not in the cards, another inexpensive strategy is to introduce each new witness with a single neutral sentence letting the jurors know why they are there.

Does your case involve a series of events? Give the jurors a break and make them a timeline. This is particularly helpful in medical malpractice and construction defect cases.

Be polite to the other side. Don't object to everything. Objections are a lose lose proposition for you. If you win, it looks like you are hiding something. If you lose, you are a loser. If it is important, fight it out in advance before you pick your jury and don't waste trial time with sidebars. Acknowledge your weaknesses. Nothing will gain you more credibility. This applies to your experts especially.

Ready to stretch? Consider stipulating to letting jurors talk with each other throughout the trial. Arizona has been doing it for years. It has NOT given an advantage to either side, according to every study and oversight that this innovation has generated. It acknowledges what we all know. Jurors DO talk to each other throughout the trial. What it does do is to knock out the surreptitious formation of cliques, it reduces the amount of improper talking jurors do with outsiders such as family or friends, and it allows them to correct or understand the evidence so that when deliberations actually start, they don't have to start figuring out what happened.

None of these points cost a dime. But they do mean you must pay attention and you must know where you are going before you stand before that panel of citizens who, these days, could include someone like your doctor, your sister, your lawyer, your personal trainer or your spiritual advisor.

One Day One Trial? I think Mikey likes it!

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From Hon. Jacqueline Connor (ret.)



JUROR NUMBER EIGHT

CAALA Advocate Magazine - July 2012
CTLA Trial Talk - November 2012

There are increasing numbers among us who never saw or no longer remember the classic 1954 teleplay/film/Broadway hit TWELVE ANGRY MEN.” (Feeling old yet?) If you are one, you missed a legendary performance by Henry Fonda in the 1957 film version. He was the sole holdout among twelve white male jurors in New York City determining the fate of a young Puerto Rican man from the slums accused of murder. Fonda played Juror Number Eight. He undertook, in his quiet understated way, to research the weapon used by the accused defendant, and purchased the identical knife in a nearby store, throwing doubt into the biased assumptions of the other eleven jurors. He is the unabashed hero of the story, turning the other eleven around with calm persistence and logic as he engaged in combatting the racism underlying the perceptions of the other jurors.

While we applaud the valiance and integrity of Juror Number Eight in forcing the other jurors to really look at the case, he committed classic and unequivocal juror misconduct by searching for support, investigating the crime and bringing evidence into the trial under the noses of the lawyers and judge. What’s a body to do?

It is even more problematic when you consider that a juror today could have found the knife in seconds by googling it.

In March 2009, a defendant in a Florida federal case defended against the charge of illegally selling drugs through the internet. One of the jurors contacted the judge when deliberations had started, to let him know that another juror had admitted doing research on the internet. Hoping to resolve the problem by simply kicking the errant juror off, the trial judge was initially concerned only with the issue of whether this information had been communicated to the other panelists. To his and everyone’s surprise, he found that in fact eight more of the jurors had also gone online to do research. I would pose the thought that these may well have been the only jurors who admitted their misconduct.

Internet access providing instant information, fact checks and postings have become even more ubiquitous and have almost become part of the air that many of us breathe.

Smartphones and ipads can be seen freely in use at funerals, concerts, airports, movies, dinner tables, restaurants, religious services, weddings, meetings, classrooms, and while driving. The only place where they absolutely cannot be used is in the trial courtroom (and apparently Augusta National Golf Club)...at least with respect to the subject at hand. This makes jury service extremely unattractive to many and impossible for some.

A father wrote in a recent article that he checked into his son’s texting habits and found, to his shock, that his teenager sent more than 15,000 texts per month. A survey found that some college students felt it was permissible to text during sex. In an article about young people on a sleepover, the accompanying photo showed all the kids sitting around in a room with each one absorbed on his own smartphone, texting, twittering, gaming, posting or chatting...with other kids.

Ten minutes of research online should be enough to scare any litigator facing jurors in this modern age of instant access to the net.

In Raleigh North Carolina, a judge in a murder trial asked for an investigation by a state bureau, having found texting by a juror to her hairdresser about the progress of the case, as well as finding that another juror had posted that the jury split in a deadlock, 9 to 3 guilty before the verdict was announced.

<http://www.newsobserver.com/2012/03/07/1910896/jury-in-young-retrial-is-now-under.html>

A new trial was granted by the Vermont Supreme Court when it was discovered that a juror conducted research on the Somali culture and shared it with fellow jurors in a trial alleging child sexual assault against a Somali defendant. The trial

court's refusal to overturn the verdict was reversed by the state supreme court.

<http://www.burlingtonfreepress.com/article/20120127/NEWS02/120127025/Supreme-Court-orders-new-trial-man-convicted-sexual-assault-child?odyssey=nav|head>

A Florida man was dismissed in a personal injury case for friending an attractive defendant on Facebook. While waiting to be selected. Not upset about being kicked off, the juror was only too happy to have gotten off jury duty. While waiting in the pool of jurors, he admitted that he had used his phone to see if he knew any of the people involved, and claimed to have "accidentally" friended the defendant.

<http://www.foxnews.com/us/2011/12/31/florida-juror-dismissed-for-friending-defendant-on-facebook/>

A Wilmington, Illinois woman facing charges of child battering, sought to have her conviction in a court trial overturned and the judge recused because his adult children were Facebook friends with members of the victim's family. The judge's adult children had been out of the home for years.

<http://heraldnews.suntimes.com/9426713-417/judges-kids-facebook-friends-at-issue-in-bid-for-a-new-trial.html>

Two judges from the Los Angeles Superior Court had fairly recent problems with this kind of conduct. In both instances, someone who read the blogs or entries was concerned enough about the misconduct to contact the court. Jury services were able to track down the juror and in each instance, the juror was confronted. Was justice restored? Hmmmmm.

The impact of this direct attack on the integrity of jury trials is further exacerbated by the economic squeeze and reduced budgets forced on the courts. For example, as the Los Angeles Superior Court looks in every nook and cranny to find ways to save money with current unprecedented budget cuts, one of the more recent changes has been the reduction of summonses by 10,000 jurors per week and a strictly enforced policy of smaller jury panel sizes. Now more than ever, we need jurors more than they need us, and every one of them counts. There may well be no replacements if a panel is exhausted through the use of challenges.

Resistance to new technology is clearly and laughably not a new theme. In the 15th century, Filippo de Stratto, a Dominican friar from San Cipriano on Murano, a part of Venice, descried the invention of printing. He claimed that the world had gotten along perfectly well for 6000 years without printing, and that there was no need to change it "now."

Are we like de Stratto, wailing in the wind, trying to hold back the tsunami? While we always knew that jurors sometimes improperly talked to each other before the trial was over, or discussed their case with family or friends in violation of judicial admonitions, the exponential impact of the information age on the decisions of jurors is virtually impossible to quantify.

The last time I counted popular social networking sites, I ran out of fingers. These have included MySpace, Facebook, Plaxo, Tumblr, Live-Journal, Tagged, Pinterest, Linked in, Twitter, Google Plus, DeviantArt, Orkut, Ning, Bebo, Friendstar, Meetup, Yappd, Foursquare, Zude, Gather, Rabble, Jaiku, Pownce, Six Apart... check back again in fifteen minutes.

Damage from jurors' instant access to information is limited only by our imaginations.

Already, stories abound of jurors googling the attorneys, the parties, the judge, the witnesses and the experts, technical terms, the subject matter of the trial and everything in between. The scene of an incident or accident can be viewed via satellite photos on the net. These internet photos can be current or from a completely different time period than the incident at issue. Information can be obtained regarding drive times between point A and point B to check the veracity of trial testimony. Prior transgressions or lawsuits (or lack thereof) and the litigiousness (or lack thereof) of the plaintiff or defendant can be pulled up. A statement by a medical expert, challenged by a competing claim by the opposition expert, can be checked online.

There is more than just the danger of independent research. There exists the problem of communications and expressions of opinion, or postings of status, with jurors describing their experience on blogs or twittering their thoughts of the presentation, or announcing the pendency of a verdict.

Beyond these are the problems of a drive for fame in situations where awards or verdicts are influenced by taking

politically correct or incorrect positions or inflating awards to improve their media status or increase the numbers of followers.

The impact doesn't stop there.

Public confidence in the integrity of jury verdicts and the justice system as a whole is eroded by stories of irresponsible internet behavior, such as the juror who conducted a survey on Facebook seeking input as to what her verdict should be in a trial she was serving on. Or by the reporting of a juror who tweeted that he just gave away millions of dollars of "someone else's money," warning his followers not to buy defendant's stock. Or where a trial involving toxic leaks revealed that jurors were researching groundwater contamination during the trial.

There are now stories of unidentified persons "planting" false stories in pending trials, ostensibly hoping that jurors might stumble on them. Included have been false confessions or false allegations of misconduct against one of the parties. It has also never been hard to find youtube videos making a case for juror-nullification.

Jurors who think their thoughts/comments/positions might end up on another juror's blog, may also be inhibited in the free flow discussion that is the hallmark of jury deliberations. The chilling effect is something that cannot be measured and should not be discounted.

Multitasking has long been proven in study after study to show that the many tasks being done concurrently are not being done very well. The same applies to jurors. Those who are constantly checking their Facebook pages or other sites, even if unrelated to the trial, are not giving the parties and the attorneys their full attention. It is not uncommon to see heads bob down as jurors quietly check their smartphones low in their laps...or even inside their pockets as their fingers move over the keys sight unseen.

Why are jurors ignoring or skating the increasingly strident admonitions regularly issued by courts? There are many excuses. "Everyone is doing it." "You are googling us, why can't we google you?" "Sorry, just habit." "The judge said no tweeting but never said anything about no blogging." "This is not 'research.'" "I am only announcing, I was not discussing anything." "I was curious." "I am being the best juror possible." "Any responsible and rational juror would seek additional information on their own since the object of any court proceeding is to use all facts obtainable to determine the truth." "You better believe I will do whatever research is required to unravel this case using due diligence." "This was private!"

The truth hurts. Short of surrendering, which is a position advocated by some, there are some things we need to consider doing and doing well.

First and foremost, jurors need to be told at the earliest possible stage that jury service precludes the use of the internet to communicate/collect data or otherwise express anything to do with their service, even monologues. Admonitions can't wait till the jury is picked. It has to happen before the first break, when mischief, albeit innocent, may already be brewing. The admonition should include information about the consequences to the justice system when violations occur, even unintentional violations. These consequences include the cost to taxpayers, the cost to the parties, the difficulties of retrials, lost witnesses and lost evidence as a start.

Violations of admonitions not to consult the internet now constitute a criminal misdemeanor under AB 141, effective this past January. However, this has created a whole new conundrum because jurors theoretically cannot even be questioned about potential transgressions without impacting their 5th amendment rights.

I have come to believe that the most powerful message that has to be conveyed is how absolutely unfair it is for the parties to be blindly sabotaged by information that they never had a chance to explain, refute, deny, concede or correct. They need to understand that internet misconduct strips the parties of their constitutional rights to a fair trial without their consent or knowledge.

Second, jurors should be given information, all the information, that they require to do their job. California court rules already support jurors being allowed to ask questions. This approach should be enthusiastically embraced, as it is far better to have them ask you than someone else. Give jurors the jury instructions up front, all of them (not just the elements of the causes of action), and provide them with their own copies. Give them a copy of the verdict form right at the beginning so they know what their "final exam" is going to look like and they understand why you have to spend time developing evidence on certain subjects that are not otherwise clear. Provide a glossary of all unusual and/or

technical terms and phrases that will show up in the trial.

Third, voir dire needs to address the issue directly. One judge uses a powerful technique by having each juror personally explain why the prohibition is necessary and important. There are also some great questions that can flush out the addicts such as “have you already posted something on the net about your service here?” or “how many texts or tweets do you send daily, “or “how often do you get the latest technical gadgets” or “how often do you blog and do you have a pseudonym” or “have you ever posted a youtube video” or “how often do they check their smartphones?” The most direct question is to ask whether they can cut the cord during trial.

Fourth, trial lawyers should google or research everything they can about their upcoming trial, including themselves, witnesses, experts, technical terms and the subject matter of the dispute. (Some lawyers have completely revised their websites and others change them when their attorneys are in trial.) They might also create twitter or internet alerts when certain terms pop up.

Fifth, have the jury instructions include a “snitch authorization.” Jurors should be clearly invited to let the judge know if they become aware of a violation so that the judge can protect the integrity of the trial. It is helpful in the instructions and admonitions for the judge (or the attorneys if the judge doesn’t) to give examples of what is prohibited so there can be no misunderstandings. The fine line not to be crossed, however, is to be too specific, setting up the inference that there is something out there that someone doesn’t want them to find, a tantalizing challenge that some jurors won’t resist.

Sixth, keep the trial on target and don’t waste jurors’ time. Shorter trials have a smaller likelihood of bored or confused jurors going online to fill the gaps left by the attorneys. Avoid sidebars and keep the momentum of the trial going. Handle procedural issues and other bumps in the road before or after jury time. Keep presentations lean and necessary and cut out the fat.

Some courts have worked with taking away smartphones and ipads. However, jurors have access outside of the court, and while in the courthouse, may need them for work and other legitimate uses. Also, there are virtually no public phones in courthouses anymore. Taking phones and tablets away during deliberations is something that might be considered, but again, they would have to be returned at the end of each day.

Some attorneys have asked that jurors sign statements under penalty of perjury in advance as well as after the trial, regarding the prohibition of internet use. This certainly brings the issue up forcefully but may also cause the unintended result of driving misconduct underground. Jurors may be reluctant to admit having looked online having signed a statement under penalty of perjury.

Some courts have collected online IDs and passwords, and suggested to jurors that attorneys will be checking their sites. Privacy lines may be crossed however and the creation of a hostile environment cannot be truly helpful in the search for justice. There is a pending case involving a gang conviction in which a juror made what appeared to be innocuous postings on Facebook regarding how something in the trial was boring. The juror insisted that this was all that was posted but in a posttrial motion, the defense sought access to his Facebook page and password to confirm no other postings supported an allegation of bias. The juror has been fighting this, alleging that his Facebook pages include photos of his children, family and other personal information that he does not want to fall into the hands of the defendant gang members. The tension between a fair trial and juror privacy is at full confrontation in this matter. As of this writing, this has not been resolved.

Each one of these suggestions can be the subject of an independent lecture or article and there is much that can be explored about all of them.

The point is to start thinking about how to approach the problem, and a big problem it is. For our trial courts, it is our future. Can the integrity of our jury trials be preserved? The jury is out.... Way out

Questions?

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From Hon. Jacqueline Connor (ret.)



MAKING THE EVIDENCE CODE WORK FOR YOU

ABTL Report Fall 2009

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.

Questions?	Email Judge Connor: judgeconnor@adrservices.org
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From Hon. Jacqueline Connor (ret.)



JURORS AND THE INTERNET: JURY TRIALS AND MILLENNIALS

CAALA Advocate Magazine September 2011

There are daily references to the differences between the generations. Much is cultural, much relates to technology, and much relates to the interaction of the two. A recent article in the LA Daily Journal referenced the generation gap in the legal profession¹ and pointed out the disconnect that occurs when a “Millennial” (born between 1980 and 1998) actually prefers technological communication to face-to-face contact. The author, Wendy Behan, describes the sense of disrespect experienced by a Baby boomer attorney who had asked an associate to come to his office. The Millennial having sent an immediate text “What’s up?” felt he had shown his responsiveness. The generations simply don’t speak the same language.

The impact of technology shows up not just with communication but also with perceptions. The Millennials live and breathe instant information access, which directly affects their sense of world and their sources for information about their world. Is this a problem?

In the context of jury trials, it is a huge problem.

In one short month in the Los Angeles Superior Court recently, one judge was advised that a juror was tweeting about the trial and had even posted strictly-forbidden photos of jurors in the court hallway on his Facebook page. His actions were discovered when someone who followed him on twitter was unsettled about his blatant disregard for the restrictions of jury service and contacted the court. Another judge was contacted by jury administration officials when a journalist doing research on jurors’ use of the internet stumbled on a juror posting while sitting as a juror. In another case, a juror had been excused but his postings continued with fictitious details about jury deliberations. In a pending high profile case, several jurors were caught texting about the case during *voir dire* despite multiple strict admonitions. More than one had to be escorted out and confronted, only to return to the assembly room and continue the surreptitious texting. In another, a judge thought to google a defendant ready to begin a complex criminal case, and found that the second google entry on the first page was the defendant’s prior record and the third entry was his registration as a sex offender. In a civil case of elder abuse, it came to the court’s attention as jurors were being selected that the plaintiff had posted several videos and entries on YouTube dramatizing the alleged abuses by the defendant convalescent home.

Is this a problem? If I was about to start a trial tomorrow and “justice” was in the hands of twelve strangers, I would be shaking. And it is not limited to Millennials.

The underlying dynamic that leads to jurors exploring the internet despite explicit admonitions, threats and explanations, seem to consist of a general distrust of authority, the increasing ease of focused research

available, the accessibility of different forms of technology (expanding by the minute), and growing psychological expectation of immediate answers.

The various ways in which this dynamic impacts the operations of a trial are fourfold, at least as of this count. These include not only direct actions by jurors themselves, but actions that are designed to influence jurors. They appear with problems of communication and expressions by jurors themselves (tweeting, texting, posting, blogging comments and observations about their jury experiences or the trial). Secondly, they involve the problem of jurors actively researching their case (looking up words, researching issues, googling the parties, the experts, the judge, the witnesses or the lawyers). Thirdly, courts are seeing inevitable problems with jurors sensitive to media attention from high profile cases (generating a stake in the outcome). Finally, there are examples of manipulations of the internet to potentially influence jurors (posting alleged confessions of a party while the party is on trial; posting inflammatory videos on YouTube.)

Ultimately, the real danger of the internet is the complete abrogation of the right of cross examination in a trial.

A nonexhaustive search of the internet found references to a number of studies and statistics, most likely outdated as of this writing. An English study from February 2010 found that 5% of jurors admitted looking up items on the internet during trial while 15% admitted looking in a high profile case. 68% of those who searched the internet were over 30. An October 2010 U.S. report found that 4.1 billion text messages were sent daily in the United States (amounting to an average of 12 texts per day for every man, woman and child.) A more recent Nielsen poll in October 2010 found that the average teen sends out 3,339 texts per month. An August 2009 report found that 22% of teens checked their social sites ten times daily. An August 2010 study found that web users spent 41.1 million minutes on Facebook.

An Alabama lawyer in a litigation firm I spoke to said that his firm would switch websites whenever one of their lawyers was in jury trial. Jury consultants caution their clients who have websites that promote heavy marketing.

Social networking is habit-forming and life-integrating. The Los Angeles Met News in January 2011 referenced a finding that 10% of college students think it is ok to text during sex. A 19 year old Pennsylvania teenager got caught when he was texting in the midst of committing a burglary. In North Carolina, a judge and lawyer friended each other while engaged in a family law case (the judge was removed from the case and reprimanded by the local judicial commission.) A doctor in a medical malpractice case, calling himself "FLEA" blogged about his trial, commenting on strategy, his observations and other ruminations about the ongoing trial. He was caught on cross examination as he had to concede he was indeed "Flea". A San Diego juror, not disclosing that he was an attorney, blogged throughout his trial in 2006. The conviction on the trial he was serving on was overturned; he was found in contempt, suspended from the bar and hit with substantial legal fees. An Arkansas juror twittered that he gave away twelve million dollars of someone else's money.

And then there is the phoney stuff. Readers may recall some news coverage about actor Steve Martin texting about his experience on jury service, which all turned out to be completely fabricated.

The problems with expression and communication by jurors during trials are problematic enough, but the aspect of researching while on jury service is more than unsettling.

An English juror polled her followers on Facebook asking them to weigh in on what they thought she should vote on a verdict. A Florida juror in a manslaughter case in 2010 looked up the meaning of “prudent” on her iPhone. A Nevada foreman in 2010 searched online for types of injuries to child sexual assault victims. A juror in a capital case researched the backgrounds of other defendants on death row. In another capital case, a juror in a shaken baby case researched issues of retinal detachment. In other criminal cases, jurors looked up the definitions of reasonable doubt and rigor mortis. An award for \$104 million was challenged when it was determined that jurors had researched groundwater contamination issues online.

New trial motions have abounded, some granted and some denied. Some judges find the transgressions simply bad taste. Convictions have been overturned. Twitter postings in post trial motions have been provided with time stamps indicating exactly when the twitters were sent. Jurors have been fined; others ordered to write essays. In another state, a juror was fined substantially for the costs of a mistrial, though that consequence resulted in a scathing editorial in the local paper the next day. One pending matter currently involves a fight now before the California Supreme Court regarding a trial court order to turn over facebook postings. In that particular case, the errant juror is refusing, claiming that access would expose his children and family to danger from the gang defendants whose rights were allegedly violated by online postings.

These transgressions in the face of admonitions are ubiquitous.

Why is this happening?

Jurors say they thought they were told not to blog but the judge never said they could not twitter. They claim they are curious and are determined to be the best juror possible. One blogged that “any responsible and rational juror would seek additional information on their own...the object of any court proceeding is to use all facts obtainable by any means....if I ever sit on a jury, you better believe I will do whatever research is required to unravel the case using due diligence.”. Jurors believe facts are suppressed to exclude evidence “inconvenient” to the judge and lawyers. Some feel they know they are being googled so of course they can google as well. Others don’t see going online as doing “research” and don’t see such efforts as “discussing” the case.

Meanwhile, the power of the internet in “exposing the truth”, whether one is viewing Arab Spring or China or Africa, is regularly on the big screen on a daily basis.

And what can jurors do with net access? Crime or accident scenes can be viewed. Google maps can be used to check travel times and compare these with alibis. Technology can be checked on Wikipedia regarding patent claims. Definitions of technical terms can be found. Witness backgrounds and CVs can be compared. Expert qualifications can be plumbed in more depth. Sentences for crimes can be determined. A defendant’s prior record can be viewed. Court filings and attorneys’ motions on various

pieces of evidence can be accessed. Sex offender registration can be retrieved. Jurors can also video tape a trial, a witness or other jurors on their smartphones. Jurors can achieve instant stardom by texting or tweeting during a trial, high profile or otherwise. Jurors can even post inflammatory items on their own facebook pages in order to manipulate the parties in order to avoid jury service. Videos on jury nullification can easily be found. Jurors can find planted YouTube videos or other facts about a case.

So...what is there to do?

Google yourself, your witnesses, your clients, and issues in the case to be alert to potential danger. Courts can consider giving better and more frequent admonitions. Cell phones can be confiscated during sessions. One attorney had jurors sign a statement under penalty of perjury before and after a trial that there was no internet use connected with the trial. Jurors could be given a snitch instruction to advise the court if any other juror violates the rules. Online IDs or passwords of jurors could be collected during the trial. Jurors can be sequestered. Perhaps the most radical response is to embrace the new technology.

None of these solutions is particularly foolproof and some are simply not palatable. Jurors can always look up something once they get their cellphones back. They can go further underground in their efforts. Certainly better questions during voir dire can be designed to ferret out those who simply cannot forego the constant connection with the net.

An effective question during jurors' first appearance in court would be to have the judge ask how many jurors have already posted, texted, tweeted or blogged about their jury duty. In voir dire itself, jurors might be asked how many texts are sent and/or received in a normal day, how they get information, whether they have ever posted a YouTube video, and how comfortable they are completely cutting off internet access with respect to any connection with their jury service and trial. These questions may disclose those who may be the most likely offenders. Certainly, the first admonition must be given before jurors are excused for the first recess.

A review of a party's entire trial strategy is highly recommended. Allowing jurors to ask questions should be absolutely mandatory. Giving them a glossary of terms used in the trial is very helpful. Paring the trial to avoid repetition and avoiding consuming time with undisputed matters and keeping the trial as short as possible will keep jurors engaged. Expedited Jury Trials are an option where the issues are limited. Letting jurors know they can be tracked is something to consider. While the court cannot track jurors, many of the transgressions have in fact been "outed" by journalists and public readers of the postings. Jurors should be advised of the consequences of misconduct, though there are no real penalties to the jurors other than to be excused.

The most effective technique available appears to be an explanation of the costs and reasons why internet access relating to a trial is prohibited. Convincing jurors why this is important is a more effective technique than threatening with empty threats. A proposed judicial instruction might be:

Ladies and gentlemen, we are going to start the process of choosing jurors. You will be the judges of the evidence in this trial. In getting this case ready for you today, each side has had the opportunity over the last several months to make sure that only legally admissible

evidence is given to you and that any evidence offered to you as judges, is done with both sides having had the chance to challenge or support it. It is and has been my role, as the judge of the law, to make decisions on what evidence is admissible and can be presented to you, and what cannot.

The reason I am telling you this is because it means that while serving, you cannot, you may not and you must not use any form of electronic communication or research on your own. It includes looking up information, even the definition of a word used, as well as simply talking about the case before it is over.

There are very good and powerful reasons why our courts are set up in this way and why the Constitution guarantees this protection. Before you came into this courtroom, evidence that either side wanted to present could be tested. It could be shown to be right or wrong. It could be investigated, questioned, contradicted or supported. Just as neither side is allowed to “sandbag” the other with secret or surprise evidence, neither can jurors “sandbag” the people who have come into court seeking justice. Having even one juror make a decision from information gathered in secret violates the rights of both sides, and undermines the public process guaranteed by our Constitution.

A violation of this order can result in an unjust verdict or a mistrial, causing everyone to start the trial again from the beginning. This is not just. It can also be very expensive financially and emotionally for the parties and for the taxpayers, namely you and your neighbors. It can also lead to a finding of contempt of court.

Besides being a violation of important guarantees of our Constitution, it would be completely and terribly unfair to the very people coming to our courts for justice.

I need to emphasize that this restriction not to look things up or talk about the case, is not limited to face to face conversations, written dialogues or even monologues. It includes every form of electronic communication. While you are here as a potential or selected juror, do not use any electronic device, or media, including cell phones, internet chatrooms, blogs or websites, any social networking sites or online diaries, to send, post, text, twitter or receive any information about this case to or from anyone. This includes an order not to go to internet maps or mapping programs or any other way to search for or view places discussed in the trial. It also includes an order not to photograph or videotape any person or events involved in this trial, in the courtroom or outside hallways.

As all of you already know, some of what is available on the internet is inaccurate, misleading or presented in unrelated contexts. Information, even if accurate, can be inflammatory, prejudicial or unrelated to the issues you are here to decide as neutral, dispassionate judges. Also, some information may simply not be legally permitted on the issues you will be deciding. It is simply not fair to the parties and to the system, to have even one juror making a decision based on something discovered or communicated outside of this courtroom that the parties never even knew was deciding or influencing the fate of their case.

I realize, especially for some of you who have grown up with the internet, that searching the internet and doing instant research is easy and as routine as breathing. This jury service may be the only place and time in your lives when you must not access the net while you are doing something. It is available when you are in schools, businesses, social occasions...anywhere and everywhere. I also know from many years on the bench that jurors are more determined than I have ever seen before, to make sure that they get it right. The right thing in this courtroom is to make sure that all jurors see and hear all the evidence, at the same time. This is the way to keep this trial fair.

I also am guessing that a number of you have already posted something on the net about being here on jury service today. That must be your last posting or comment until you are released from this trial.

Does anyone have any questions about this?

A compelling judicial admonition is available online at <http://www.ncsc.org/topics/jury/jury-selection-trial-and-deliberations/resource-guide.aspx>. Scrolling down this website to jury instructions provides a link to a video of Judge Shelton speaking to jurors in a convincing and persuasive manner.

This is a new world. Not being prepared can be fatal.

Endnotes:

¹“Generation Gap in the Legal Profession” Wendy Behan Los Angeles Daily Journal Perspectives May 2, 2011

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



From Hon. Jacqueline Connor (ret.)



12 BEST WAYS TO SABOTAGE YOUR MOTIONS

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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 as 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