Judge Steven J. Kleifield
LOS ANGELES SUPERIOR COURT

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Effective courtroom lawyering

DON'T ANNOY THE JUDGE. WHY WOULD YOU WANT TO ANNOY THE PERSON YOU ARE TRYING TO CONVINCE?

I have been in courtrooms for 40 years, 22 as an attorney and 18 as a judge. When I was sworn in as an attorney in 1980, I became the only associate for two partners. As you might imagine, I was assigned to appear at all the law and motion matters. In those days we had a master calendar system at the Stanley Mosk Courthouse. All the trials were assigned out of Dept.1, which was so backed up lawyers answering ready were given a beeper, which would sound when a courtroom became available for trial. Most of the civil judges were solely trial judges. All the law and motion matters were heard in five or six courtrooms on the eighth floor. It was said, "the only thing between the eighth floor and God is the cafeteria."

It was not unusual to have twenty-five or thirty matters on calendar! Outside the courtroom a paper calendar was taped to the wall. Under each case would be written "Granted," "Denied," or "Hear argument." This is what passed as "tentative rulings." You could also get your tentative ruling by calling a number for the department, usually after 4:30 p.m. or so. You would hear a recording of someone (probably an overworked research attorney) reading the tentative rulings in the order of the calendar. If you were number twenty- eight on the calendar and someone next to you started talking while your tentative was being read and you missed it, you had to call back and listen to the whole recording again. More often than not you got a busy signal. It might take you an hour to get back to the recording.

Standing room only

The courtrooms were packed, standing room only. Some judges called the cases in order; some asked for time estimates and called the shortest matters first. The bench was filled with piles of thick files. When argument was over the judge would hand the file to the clerk or

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drop it on the clerk's desk with a loud thump. Some of the judges used a slide for the files that went from the bench to the clerk's desk, which I found to be entertaining.

Unlike some who wanted to get out of there as quickly as possible, I secretly hoped my matter would be called toward the end of the calendar. I wanted to hear the summary judgments, the motions to "expunge a lis pendens" (whatever that was). I wanted to see what lawyers and judges did in the courtroom.

When the calendar was over, I would step out into the hall, which in those days was filled with cigarette smoke, and find a phone booth down the hall. I would drop a dime in the slot to call the office and report the result. If it was a long call I needed to drop in another dime or two, so I made sure to keep a bunch of dimes on my nightstand. There weren't any wage orders in California that I knew of at the time that covered the subject, so I didn't ask to be reimbursed.

The Mosk Courthouse, where I currently sit, was not the only courthouse I appeared in. I drove to most of the courthouses throughout Los Angeles County, as well as courthouses in other counties: Orange, San Diego, San Bernardino, Riverside, you name it. I had a "Thomas Guide" in my car. I don't know if they make them anymore. It was a thick booklet with pages of maps, each with numbers on the side and letters on the bottom (or maybe it was the other way around). You would look up an address, and the index would tell you what page to go to, along with the letter and number. You could then find your courthouse at page 45, "A-3."

Times have changed. Judges (usually) don't have piles of files on the bench; most of us use the computer. I do. We have GPS to help us get around. And we have cell phones to report back to the office. As a result of the COVID-19 pandemic, we now almost exclusively have remote appearances on a screen.

But one thing *hasn't* changed: what makes for effective lawyering in the courtroom.

Different goals of lawyers vs. judges

Why are some lawyers more effective with judges than others? I think a lot of it comes from an understanding of the different roles of judges and lawyers. Judges all used to be lawyers, but we're not anymore. Our goals are different than yours. Your goal is to win. Your client hired you to get the best result that you can. You have a lot at stake. If you work on a contingent fee basis you take personal financial risks. Maybe you have an important client that you want to keep.

Judges' goals are different. Take a look at the mission statement on the Court's website at lacourt.org.: "The Los Angeles Superior Court is dedicated to serving our community by providing equal access to justice through the *fair*, *timely* and *efficient* resolution of all cases." This is what judges believe in. We come from a wide variety of backgrounds, both personal and professional; we vary in political affiliations and views. Some are extroverts, a larger percentage are introverts. But one thing we have in common is a dedication to the fair, timely and efficient resolution of all cases. We want to be fair in our decision-making, but we need to do it in a timely and efficient manner.

I view "fairness" as including "reaching the right decision."

Another thing to understand is the current reality of what the civil judges are facing. I have it on good authority that at one time the average caseload for an Independent Calendar (IC) judge was about 250 cases. Now, largely due to the pandemic we are emerging from, it is common for an IC judge to have a caseload of 700 cases or more! Think about it. Very few civil jury trials have taken place in over a year. During that time, trials were routinely continued for lengthy periods of time. New cases are still being filed, which also need trial dates. We can only set so many cases for trial on any one day. We all know that nothing settles a case like a firm trial date. So as fewer cases settle, more cases get set for trial. In my court we are setting new cases for trial something short of two years out.

You are experiencing longer waiting periods to get your motions heard. More cases mean more motions. We can only hear so many motions in a day.

Along with the increase in motion hearings is an increase in case management conferences. Every case needs to have at least one; many cases have multiple ones, and some have further status conferences to boot. You may not know it, but in the days I was speaking of there were no such things as case management conferences. In fact, there was no "case management" at all! There were a master calendar department, law and motion court, and trial courts. There's a lot to do, and we don't have unlimited time to do it.

The bottom line in effective courtroom lawyering is this: if you want to meet *your* goals, help me meet *my* goals, i.e., the fair, timely and efficient resolution of cases. Help me reach the right decision.

Here are some suggestions on how to help us meet our goals, in an era when time is at a premium.

Follow the rules

Rules exist for a reason – to make things run smoothly. They help us achieve our goal of *efficiency*. Let's say you filed a motion to compel the deposition of a witness but failed to serve the witness. There are two things that can happen, neither of which are good. Some judges will deny the motion outright; others may continue the hearing with an opportunity to serve the witness with the motion and notice of the new hearing date. In either event, you will now be taking up what could be someone else's hearing date. That doesn't help us achieve our efficiency goal. It also means that when you appear the next time, I may not look too kindly on the fact that the motion had to be looked at twice rather than once.

Don't interrupt each other or the Court

If you've appeared in my courtroom, you will probably know that interruptions

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are not tolerated. Interruptions are common in everyday conversations. People are often thinking about what they want to say while the other person is speaking and jump in before the other person finishes. It doesn't work in a courtroom.

The most common reason for interruptions that I see is to express disagreement with what the other person is saying. "Your Honor, that's not true" is the most common interruption. If I give you the opportunity at that moment to explain why it's not true, I then need to give the other person the opportunity to explain why it *is* true. We will now get into a debate about one fact, which will take us off-course. Once counsel see that this is an appropriate way to proceed, it will happen again and again. Nothing good happens when counsel interrupt each other. It slows things down and makes decision-making more difficult. It also interferes with my ability to make a record if there is a court reporter.

Be assured that you will be heard. Make notes while the other person is speaking. You will then be given an opportunity to address all the points made by the other party and make any additional points. This works much better for me, the person who needs to make the decision.

Even worse than interrupting each other is interrupting the Court. Accept the fact that I'm running the show. Nothing good happens when you stop me from doing my job. I have a reason to say what I'm saying; I'm not engaging in idle chit-chat. It may not be clear to you why I am asking a question. You may not understand why I have been talking to one side for some time without having heard from you. I have my reasons. Frankly, it's also annoying. Why would you want to annoy the person you are trying to convince?

Interruptions interfere with our goals of efficiency and fairness. I need to get through my morning calendar. I have other motions to read, rulings to write, cases to try, etc. I can't spend all morning, and interruptions cause delay.

Don't "argue" with the judge; have a conversation

The term "oral argument" is something of a misnomer. I do not want you to argue with me. You should not want me to argue with you. What happens in your personal relationships when someone starts to argue with you? They raise their voice, temperatures rise, you raise you voice, each side gets defensive, and points of view get entrenched. Argument may help you get some pent-up feelings off your chest, but it doesn't accomplish much.

If you are trying to convince me, have a conversation with me. When I appeared in court as a lawyer I was pleased if the judge (or Justice) asked me questions. It showed that the judge was engaged and was open to being convinced of my position. I could have a conversation with the judge, explain my reasoning, and hopefully be persuasive. You should do the same.

Answer the Court's questions

If I'm asking a question, I may think it's important, even if you don't think so. Don't assume that just because I ask a question, it's what I think. I often get the question back, "Is the Court saying…" No, I'm not "saying" anything. I'm asking a question. I may be playing devil's advocate, testing your argument. I want to hear your answer. If you avoid answering the question, I may assume that there is a problem with your argument.

You would be surprised how often when I ask a question of counsel during a bench trial, I am met with annoyance. It's as if I am interfering with their presentation. I may just want to understand how testimony is relevant, to help me out and to keep from wasting time. Sometimes I didn't hear the answer and just want it repeated. Since I'm human sometimes my mind will wander, and I want to make sure I am staying with the testimony. The good lawyers will be encouraged by the fact that I am paying close attention and will be grateful for the opportunity to engage with me.

Sometimes a tentative is just a tentative

As opposed to the one- or two-word "tentatives" we used to see on the law and motion calendar, many of us provide written tentative rulings. I do them in many cases but not all. I would have been grateful for them when I was practicing. But I often start hearing about the court's "order" and why it is wrong. No, it's not an "order," but a *tentative* ruling. It's not set in stone. If I didn't want to hear your views on it, I wouldn't have given it to you. Take advantage of it.

A very bad approach, one that judges laugh about, is to say, "with all due respect, your honor!" The implicit message is that the judge is not worthy of respect. I don't think I'm stupid, and I don't want to be called stupid. If I *am* stupid, I don't want to be reminded of it.

Do remember the court reporter

Before the budget cuts brought about by the Great Recession, the IC courts each had their own court reporter. In fact, the hallways between chambers have offices with "Court Reporter" on the door. Now we rely on the parties to bring their own reporter to the hearing or trial. If you do bring a reporter, presumably it's because you want to have a good record of the proceedings. If you talk too fast, mumble, or interrupt (there's that word again) we have to stop and repeat or clarify for the reporter. I try to speak deliberately, and at a slower pace.

When you state your appearance, state your name slowly and clearly. During a remote appearance, or when there are numerous participants in a proceeding, state your name before speaking, so the court reporter can identify you in the transcript.

It is common for lawyers to talk too fast when reading from a document. If you do that, I will interrupt you and tell you to slow down. You wouldn't believe how many times the reader resumes at the same speedy pace they were reading at before I admonished them to slow down. In fact, I can almost count on it. Slow down on the reading.

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Don't be obsessed with your outline

Outlines are helpful. Outlines can help you organize your thoughts and make a coherent presentation. They can boost your confidence, because you won't get lost while you're speaking. They can help you remember the points you want to make, so you don't forget something important. A well-thought-out outline is almost a necessity for most of us.

However, I do sometimes see attorneys who are so obsessed with their outlines that they are unable to respond to events as they unfold. I suspect that most of the time it is due to a case of nerves. It can help to slow down a bit. Try to listen and go with the flow.

Conclusion

My suggestions are not meant to be exhaustive. There are many other things that good courtroom lawyers learn through experience. Keep in mind your goal of helping me reach my goals, and you should do just fine.

Steven J. Kleifield is a judge of the Los Angeles Superior Court. He was appointed by Gov. Gray Davis, and took the bench on September 12, 2002. He is currently assigned to a general civil court at the Stanley Mosk Courthouse in downtown Los Angeles, where he hears a variety of civil cases.