



Judge Wendy Chang

12 ways to increase your success at trial

WITH MINOR ADJUSTMENTS, EVERY TRIAL HAS THE POTENTIAL TO BE A POWERFUL ONE

Any judge will tell you that presiding over a trial with good lawyers is one of the most enjoyable tasks we have. In the spirit of maximizing the chance of your next trial being one of the amazing ones, please allow me to present the areas where I think improvements can be made, based on the most common issues I see.

1. **Tell your story and *respond to their story***

Most trial attorneys have mastered the first part of this. They show up at trial with a theme about their case and craft their story around it. Where I see the case start to fall apart sometimes is in a failure to adequately respond to the opposing side's story. Attorneys who focus solely on their own narrative without adjusting to address the opposing one risk the jury (or the judge as the trier of fact) filling the void however they think appropriate. (The risk is even deeper for the attorneys who have no narrative to begin with, and spend the trial poking random holes in the other side's story). I usually see many potential pathways for a harm-mitigating/neutralizing response, if the lawyer just would take one. But the original lawyer frequently does not see it, so wedded they are to their own narrative. The trial becomes disjointed and dissonant. Negative outcomes frequently follow.

2. **Respect your jury's sacrifice**

Lawyers say they know the jury's sacrifice. Many will thank the jury. But I wonder if some lawyers truly think about what jurors go through to serve on their case. Los Angeles is large and is car dependent. Gas is increasingly expensive, cutting into already tight budgets strained by increased costs for basic living expenses, particularly with groceries.

Parking can be pricey in many areas around the courthouses. Some jurors do not get paid for jury service, many incur unreimbursed expenses, some must delay appointments or trips, incur costs to arrange for alternative care for loved ones, or undergo transportation challenges either through traffic or having to take public transportation for physical distances that take significant time. Lawyers must always respect the jury's sacrifice when presenting their case.

Most lawyers have the "be on time" part down. Areas where lawyers stumble and take unnecessary juror time are: 1) a lack of organization, resulting in fumbling with mountains of bulky exhibit binders while the jury waits; 2) failure to have evidentiary issues identified early and ready for the Court to complete ruling on *before* the jury must wait outside or through numerous side bars; and 3) failure to have witnesses available on deck in a misguided attempt to be helpful to the witness's schedule, but ignoring the jury's. Every minute of the jury's time should be used in hearing the evidence in your case, and their time should be a lawyer's priority.

Finally, the ultimate mark of a lack of respect for the jury is over-trying the case. Too many questions, too many witnesses, too many exhibits. Overlong arguments. The seven-day trial turns into 15. The jury stopped taking notes at day 10, and go running for the exits as soon as they are released.

3. **The mountains of exhibit binders**

So many times, a trial starts with the attorney service dropping off 10? 15? 20? boxes of exhibit binders. This inevitably leads to a significant game of Tetris inside the courtroom, as everyone tries to find space for all the binders and a method of easy access to them. If your case is of this variety, remember to bring in whatever shelving/cart(s) you need to ensure easy access to all volumes for the witness (and yourself). Having to heave banker boxes around whilst searching for a volume looks disorganized and wastes time.

I fully understand the need to have access to all potential evidence one *might* need, given the requirement that all exhibits must be exchanged before trial. But that does not mean you must have the entire universe of paper for your case identified in the exhibit binders. That many binders (which are almost always bulky 4-5" binders) inevitably means that the trial turns into a body-building exercise, with one exhibit from volume 5, the next from volume 30, and the next one from volume 1, etc. (Don't get me started on the chaos that ensues if the binders' rings are broken or have gaps and the exhibits start falling out.) All the shuffling takes time, which goes back to the prior point about respecting the jury's time. In the modern world where many documents are now stored digitally in the ordinary course, a digital-hybrid presentation makes the most sense (and is the most effective).

4. **Presenting evidence hybrid with technology is impactful**

Presenting evidence digitally is very powerful. Juries are more engaged when trials look more like the tech-influenced trials they see on media. The technology now exists in Los Angeles courtrooms for lawyers to be able to easily and affordably connect their laptops or iPad to present evidence with common programs used in most law offices, without having to hire a presentation technology expert. (Presentation technology experts are great, if there is room in the budget for them.)

Even better are the trial-specific evidence presentation programs that allow portions of documents to be highlighted, expanded, cropped, undone, and to move on to another part of the document, all at the click of a button or the swipe of a finger, within seconds.

Use the technology. Old-school methods for the entirety of the presentation of evidence are not as effective for any trial over a day or two long. Even the best manual projector is clunky. Turning the knob to try to enlarge a part of the document is a slow and headache-inducing process. Reading from the document on the projector usually moves it out of the proper angle for the display screen, such that only the lawyer is looking at what she wants to focus on. The projector also noticeably raises the temperature in the courtroom, which can become so warm as to be deeply distracting.

My caveat is that the use of technology needs to be seamless. If the presenting attorney does not have the technological capability to move through the evidence quickly, the attorney should bring someone who can. Saying "just a second" while rummaging through the computer to find the correct exhibit, for every exhibit, showing extraneous information on your screen by mistake, all with what feels like the speed of Flash the Sloth in Zootopia, undermines the lawyer's effectiveness and disrespects the jury's time.

I say "hybrid" because in my courtroom, I require one complete physical set of all exhibits for the witness, and one complete set for the clerk for the official record. The official record is self-explanatory. For the witness, I require that the witness have easy access to an entire physical exhibit before answering a question so that they can review it first, if they wish. Otherwise, they are beholden to the questioning lawyer who controls (the portion of) the digital evidence being shown on the screen. This is especially important for Evidence Code section 776 witnesses or cross examinations.

Digital evidence presentation is particularly impactful in cases with a lot of exhibits. It eliminates all the fumbling with heavy binders.

I have had lawyers come in with an alternative approach that has worked well. The lawyers present on trial day one with two full sets of written exhibit books – one for the witness, and one for the clerk for the official record.

Then, for every witness, counsel prepares a mini-binder of only the exhibits that are going to be presented to that witness; all cross-examining lawyers do the same. If it is a wholly paper exhibit trial, a minimum of four copies of the mini-binders are then brought to court – one each for the witness, the questioning attorney, the opposing counsel and the judge.

If it is a digital trial, then only two copies of the mini-binder are required – one for the witness and one for the judge. Additional copies can be brought if any counsel wants one. (The clerk only works from the official complete exhibit set.) The questioning then goes smoothly, with a finite set of easily manageable papers. This method should not create significantly more work other than in the copying – presumably, the questioning attorney has a version of this information already pulled and organized for their own preparation relating to the witness. Any additional copying required by this method must surely still be less than three additional full exhibit binder sets under the traditional binder method. Finally, one complete set of the exhibits is behind the witness stand, if an unplanned exhibit must be accessed.

5. **The joint exhibit list is your friend**

I often receive Exhibit Lists with the "stipulate to authenticity" and "stipulate to admissibility" columns either blank, or with boilerplate objections repeated. The trial then proceeds in an endless loop of the following pattern: 1-2+ minutes of question and answer to lay foundation for authenticity and admissibility; "Your Honor, I move exhibit 'X' into evidence"; "Any objection?"; "No objections, Your Honor." "Admitted." This exercise takes 2-3+ minutes. Sandwiched between these technical activities will be bits and pieces of the facts for which the witness is on the stand, presented in a broken fashion.

I wonder why many lawyers treat the joint exhibit list as a dreary obligation and seem to prefer taking a material chunk of their trial time presenting their witness's testimony in fragments, inserted between loops of evidentiary legalese.

I challenge you to view the joint exhibit list as a tool. Truly meeting and conferring over authenticity and admissibility for each individual exhibit allows the attorneys to pinpoint with clarity what exhibits will present problems at trial. This permits the lawyers to raise the issue early with the Court, without the jury waiting.

When the stipulated exhibits come up at trial, the lawyer need only say "Exhibit 'X' was stipulated to, Your Honor." "Admitted." Done in 10 seconds at most. The witness's testimony can proceed in a continuous and clean way for the jury.

This effort also identifies clearly whether a custodian or other witness is needed to testify at trial to the evidentiary formalities. I have seen too many lawyers who treated the exhibit list as proforma tedium, only to discover in the heat of trial that they were wrong that the opposing counsel would stipulate. These lawyers have no witness to cure the defect, an objection is made and sustained, and the result is a major piece of evidence is excluded.

Finally, the time taken pre-trial to properly address each individual exhibit will pay in spades, allowing your witnesses to testify in a largely uninterrupted account. It also allows each side to maximize trial time, particularly helpful if the judge has imposed time limits on the trial presentation. If doing it this way takes too much time because your exhibit list is too long, please consider whether you have too many exhibits.

6. **Make jury instructions and verdict forms an early priority**

Although easily the most important documents needed at trial, it seems some lawyers treat them as afterthoughts. These lawyers appear to think they have the entire life of the trial to continue to refine these documents and present the court with amendments. Even with a judge pushing them to finalize these documents by the final status conference (or first day of trial, for some judges), sometimes the attorneys resist and every day, promise the judge that they will make amendments overnight, meet and confer with opposing counsel, and return to court the next day with the perfect document.

What inevitably happens, though, is that the lawyers get caught up in preparing for the next day's witnesses. They are unable to reach the other side at 2 a.m., which is when they finally turned to addressing the edits. What is turned in to the judge is not correct, and the pattern repeats until that day when everyone knows we are in spitting range of closing arguments. It comes so much faster than you think, and there is no time left. There is a mad last-minute rush. The parties may work through lunch or stay late.

And what ends up looking fine in the middle of the chaos turns out to not be what the lawyers wanted the jury to hear or fill out, a fact that only comes to light when the verdict is aberrant, sometimes to all sides. In post-trial proceedings, the lawyers try to unwind the mistakes. Will the judge grant a do-over? Will the Court of Appeal?

Get these documents done early, before you are consumed with the daily stressors of a live trial. Your judge is not being capricious when they push you every day to get them finalized early. They have seen the consequences too many times, and are trying to help you avoid it. Learn to recognize it when the judge is trying to hand you a lifeline.

7. **Corroborate witness testimony**

The process of litigation can result in a positive bond between a lawyer and a witness. That bond sometimes results in a sort of blindness to the dissonance between the witness who shows up to her lawyer, and the one that is described by other witnesses and who appears in the documentary evidence.

Due to their bond, the lawyer may find the witness to be credible and relatable, and as a result, offers *only* that witness's testimony to establish major factual points, if not the entirety, of their case. The lawyer misses that all other evidence shows a different person.

For example, the witness presents to the lawyer as kind, empathetic and vulnerable. The other evidence shows the witness as difficult and profane, unlikeable and unsympathetic. Sometimes the witness is a provable liar. Distrust of the conflict between the different versions of the witness can result to the witness's detriment. If that witness was the only evidence offered, it becomes fatal to the case.

Attorneys should remain objective and realistic about how their witness presents when compared to the other evidence. Adjust the presentation of witness accordingly. Corroborate the witness's testimony with other witnesses and documentary evidence, so the testimony does not stand alone when it is time to weigh each factual point.

Notwithstanding the above, do not overdo it. Burying your witness's main testimony under layers of minutiae simply dilutes the testimony.

8. **Prepare the witness**

It never fails to amaze me when a core percipient witness is on the stand and seems to be seeing critical exhibits for the first time, even though they absolutely saw those exhibits at deposition, and probably many times before the litigation was filed. Or they seem to have never thought about a critical question before being asked it on the witness stand, even though it turns out they were clearly asked at deposition, when inevitably they are impeached as it is read back to them. It is as if the witness completely forgot they already gave testimony at deposition.

Certainly, they haven't seen their deposition transcript within memory. Sometimes they think out loud, as they work out their trial testimony in real time, not always clearly and sometimes inconsistently. Obviously, the witness was not prepared before taking the stand. The consequences in the testimony are about as bad as one would expect. Witnesses should be prepared for the trial. American Bar Association Formal Ethics Opinion 508 (2023) offers an excellent discussion about the boundaries around ethical witness preparation.

9. **Regulate behavior**

Please remember one does not become invisible or inaudible when one sits down after examining the witness. Theatrical reactions, eye rolling, slamming binders, furiously pounding on one's laptop, dramatic whispers with co-counsel or client, screaming at or talking over each other or the judge; all of it only makes the attorney appear dysregulated and calls attention to the evidence being reacted to. Also, jurors do not like when

lawyers snipe at each other and very much do not like it when attorneys disrespect the judge.

Witnesses are not excepted. I vividly recall the witness who testified tearfully and emotionally about how difficult a time period was, only to flip a switch the minute they stepped off the stand and past the jury. They smiled broadly with a huge thumbs up at their spouse (a party to the case) as they almost skipped out the door.

The jury sees more than one might think.

10. **Civility is a must, but does not extend to waiving objections that must be asserted**

Some lawyers operate under personal etiquette rules about trial objections, particularly when it comes to opening statements and closing arguments. When these personal etiquette rules meet an opposing counsel who does not follow rules because they mistakenly believe they are being clever and zealous, the lawyer's adherence to their personal etiquette is often weaponized against them in post-trial proceedings through arguments of waiver, estoppel, or laches. Timely raise all objections in the moment, even if done unobtrusively. Misbehavior tends to build on itself and remaining silent does not ever make the problem better.

11. **Lengthier is not better**

The increased size of the docket of the civil courts is no secret. At the same time as the higher volume, we have the same number of trial days each year, the same five years to try all the cases, and the same static number of civil judges to try them.

Even assuming the same rough percentage of litigated cases go to trial, simply doing the math reveals an inescapable certainty – the days of being able to leisurely try your case on the timetable of your choice are likely numbered. The courts must take action to move cases through the trial docket efficiently, so they can make room for other trials.

There will be significant and growing time pressures in the coming years, the scale of which is currently hard to predict. Trial lawyers should do their part by learning to try their cases efficiently. I see lawyers do so in federal court with no problems, so I know it is possible. If everyone does their part in this endeavor, everyone will have a reasonable amount of time on the docket for trial.

Superimposed over this reality is another truth already alluded to above – our world is under increasing economic pressure, and our juries are right in the thick of it. A lawyer might think volume proves the case better. But many times, what results is an unfocused, overlong, meandering, repetitive trial. Another lawyer might think that a short trial means it is all worth the jury's time, irrespective of the issues or facts involved.

Both kinds of trials are not respectful of the jury or the sacrifices they must make to serve. Some cases do not need to be tried. Some cases need to be tried, but only require a fraction of the time the lawyers demand. In both, the jury loses attention and interest, because they recognize the disrespect.

The best trials are tight, focused and efficient. Be the best.

12. **Close the case with visual support**

The most powerful closing arguments blend the narrative, the law and connect the evidence at trial relating to each, with visual backup. These lawyers argue their narrative and address the opposing narrative, while the screen displays corroborating portions of exhibits that were shown in the trial, many times with quotes from the various testifying trial witnesses on each point, all moving quickly and seamlessly through the jury instructions and verdict form. The entire presentation is almost like a live action movie, with the lawyer acting as narrator, but the story presenting itself through the documentary evidence and the witnesses on the screen. These types of closing arguments capture the jury's attention from start to finish.

Sharply contrasted to a powerful closing argument are the ones that are the most ineffective. These have no overall narrative; instead, the lawyer has individual talking points but never connects them into a larger story. Many times, the talking points consist of poking holes in the other side's story, but there is no alternative account. So, while the jury might agree with the lawyer that there are holes in the other side's narrative, with no alternative narrative, there is no clear path to the result the attorney wants the jury to reach. Without a path, it is not surprising that the jury does not often arrive at the invited conclusion.

Conclusion

With minor adjustments, every trial has the potential to be a powerful one. My colleagues and I very much look forward to seeing you work your magic in your next trial.



Judge Chang presides over a civil unlimited jurisdiction independent calendar courtroom for the Los Angeles Superior Court, assigned to the Stanley Mosk Courthouse. Prior to her appointment, Judge Chang was a partner in a national law firm, and had a transactional and litigation practice representing lawyers from all areas of the legal industry. Judge Chang is an educator and a frequent speaker on issues of civility and civil practice.