

Preserve the right to a jury trial by maximizing juror satisfaction

Honor the Seventh Amendment by being fully engaged in the final status conference

By Judge Daniel M. Crowley

I suspect that few readers of this article would disagree with the importance of the right to a jury trial in civil cases. After all, the right to a jury in a civil trial is enshrined in the Seventh Amendment to the United States Constitution. I further suspect that few readers would disagree with the importance of citizens serving as jurors in those civil cases. As noted by Abraham Lincoln, "The greatest service of citizenship is jury duty." Jury service not only offers the populace a dispute resolution mechanism, but it also serves to educate the citizenry about our system of justice.

Yet, I fear that we do not pay adequate homage to the importance of citizens serving as jurors. We take jurors for granted. We are not mindful of their time or of the sacrifice they incur when serving as jurors. A recent poll indicated that 21% of jurors questioned reported that they were dissatisfied with how their time was used. (Brian L. Cutler & Donna M. Hughes, *Judging Jury Service: Results of the North Carolina Administrative Office of the Courts Juror Survey*, 19 Behav. Sci. & L. 305, 317 (2001).)

A citizen having a negative experience as a juror can cause at least two possible negative effects. First, from a practical standpoint, a juror's negative experience may make that individual likely to attempt to avoid future juror service. It is hard to convince someone to comply with their obligation to serve as a juror if his or her *past* experience serving felt like a waste of time. Second, negative juror experiences may erode the public's confidence in the jury system as a whole. (Diamond, S.S., *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors* in Verdict: Assessing the Civil Jury (Brookings Institution) pp. 282-305 (1993).) If enough of the populace believes jury service is an unpleasant waste of time, we may lose the political will to maintain the system.

From my experience as both a juror and as a judge, I find jurors are most satisfied when they are made to feel that they have an important role in trial and the Court and the attorneys respect that they have taken time out of their lives to serve as jurors. Consistently being told to show up at 10:00 a.m. but then not being called to business until 11:00 a.m. does not engender a sense of importance or respect. Accordingly, for the sake of satisfied jurors and, in the long run, to maintain the right to a civil jury trial, counsel should do what they can to minimize wasting jurors' time.

Maximizing use of jurors' time

I have found that one of the best ways to reduce the potential for jurors to have a negative jury service experience is for counsel to be fully prepared for trial. I have also found that one of the best ways for counsel to be prepared for trial is to fully engage in the court's final status conference (FSC). This is a two-step process: (1) Meeting and conferring in preparation for the FSC, and (2) attending the FSC with full authority to make decisions re the admissibility of evidence, the instructions to be given to the jury, and the verdict form.

The meet and confer

Los Angeles County Superior Court Rule 3.25(f) prescribes the requirements for an FSC. To be fully prepared for an FSC, counsel must meet and confer with counsel from the other side. All too often, this means that counsel's associates exchange e-mails about the documents due at the FSC. Instead, counsel should prepare for the final status conference by meeting in person. Trial counsel should attend and not just send associates. However, for the purpose of training and thoroughness, both trial counsel and associates might want to consider attending.

At the meeting counsel should explain how the trial will proceed. What witnesses will the plaintiff call, and when? What exhibits will plaintiff seek to introduce? How does the plaintiff intend to introduce them? Does the defense have any objections to these exhibits? If so, what are the objections? Will the defendant stipulate to any of the facts to be testified to or to the introduction of any exhibits? And vice versa for the plaintiff. By the time of the FSC, there should be no mystery on any of these issues; if there are, you are not prepared for trial.

At the meeting, counsel should put together a notebook for the Court to use at the FSC. The notebook should be lodged with the Court before the FSC, so the Court has an opportunity to review it. The notebook should contain:

1) Motions in limine

Motions in limine and oppositions to them most likely should have been exchanged prior to counsel's pre-FSC meeting since they should be filed to be timely heard at the FSC (16 court days plus time for service prior to the final status conference (LASC Rule 3.25(f)(2)).

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Los Angeles County Superior Court rule 3.57 mandates that motions in limine be accompanied by a declaration stating a specific reference to the matter alleged to be inadmissible and prejudicial. Vague references, such as to "items not disclosed in discovery" or "speculative evidence," will not suffice. Similarly, moving to exclude items clearly inadmissible, such as "impermissible hearsay," is unnecessary and wasteful of the court's time. (*Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 671; see also Elizabeth A. Hernandez, Esq., *Motions in Limine* Advocate, February 2014.)

The declaration must also contain a representation to the court that the subject of the motion has been discussed with opposing counsel. The declaration must also represent that opposing counsel has either indicated that such matter will be mentioned or displayed in the presence of the jury before it is admitted in evidence, or that counsel has refused to stipulate that such matter will not be mentioned or displayed in the presence of the jury unless and until it is admitted in evidence. A representation that the day before the motion was filed counsel sent a yet-to-be-responded-to email will not suffice. Counsel must engage in this meet and confer process well in advance of the date that motions in limine must be filed.

The declaration must also contain a statement of the specific prejudice that will be suffered by the moving party if the motion is not granted.

Finally, if the motion seeks to make binding an answer given in response to discovery, the declaration must set forth the question and the answer and state why the use of the answer for impeachment will not adequately protect the moving party against prejudice in the event that evidence inconsistent with the answer is offered.

Motions in limine may not be used for the purpose of seeking summary judgment or the summary adjudication of an issue or issues. Those motions may only be made in compliance with Code of Civil Procedure section 437c and applicable court rules. Likewise, motions in limine may not be used for the purpose of seeking an order to try an issue before the trial of another issue or issues. That motion may only be made in compliance with Code of Civil Procedure section 598.

The trial notebook should have all of plaintiff's motions in limine separately tabbed, with some divider (e.g., colored paper) between the motion, the opposition, and the reply, with a similar organization for the defense motions.

2] Statement of the case

Unless counsel stipulate to giving mini opening statements to the prospective jury, the trial notebook must contain a short statement of the case to be read to prospective jurors. The purpose of the statement is to advise the prospective jurors of the who, what, and where of the matter they are to decide so prospective jurors can advise if they have familiarity with the parties or the issues presented. The statement is not an opportunity to advocate. It (or the mini opening) should be along the lines of:

> This is a case involving a claim of [breach of contract/medical malpractice/motor vehicle/employment discrimination]. The plaintiff is [name]. The defendant is [name]. Plaintiff [name] contends defendant [name] [breached a contract/committed medical malpractice/negligently operated a motor vehicle/engaged in employment discrimination]. The defendant disputes the defendant's contentions.

The statement should be that simple and that short. Its only purpose is to give the 35 people who have arrived in the courtroom a general sense of what type of case they will be deciding and for whom.

3] Witness list

The witness list should list in alphabetical order all witnesses expected to be called by any party. (It does not matter if one side objects to the witness being called. The witness should be listed so the Court can address the issue.) One use of the witness list is to see if any of the prospective jurors have any relationship with the witnesses, so the witnesses' names should be listed. Asking the prospective jurors whether they know the "Person Most Knowledgeable at X Corporation" usually is of no effect.

The witness list should contain five columns labeled as follows: witness name, whether they are percipient or expert, and the anticipated lengths of direct, cross, and redirect examinations. If more than one side anticipates calling a particular witness, estimates should be provided for each side. The list should contain a tally of all the anticipated testimony (direct + cross + redirect) in hours (e.g., 17.5 hours).

At the final status conference, counsel should be prepared to address whether they truly intend to call each witness identified and to explain their estimates. In keeping with the point of this article, counsel should consider whether any witness's testimony is truly needed and whether it is duplicative of other witnesses' testimony. Jurors resent having to sit through repetitive testimony. In preparing the witness list, counsel may be tempted to include names of witnesses they do not intend to call, "just in case." This may be appropriate under some circumstances, but the FSC should be considered the "eve of trial," and tactical decisions should have been made by this time.

4] List of proposed jury instructions

Counsel will need to meet and confer over the instructions they want the Court to read to the jury. If counsel cannot agree whether a particular instruction should be given, it should simply be included on the list with a notation that it is objected to. The list should be formatted pursuant to California Rules of Court, rule 2.1055 (four columns be placed adjacent to each proposed instruction so that the Court can keep track of whether it gave the instruction, gave it as modified, refused it, or if it was withdrawn). (LASC 3.171.)

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Meeting and conferring on jury instructions in advance of the FSC is one of the most efficient uses of counsel's time, especially in cases with multiple causes of action or affirmative defenses. Reviewing jury instructions takes time, and that time will be much better spent while meeting and conferring in preparation for the FSC than at the FSC. Waiting until the close of evidence to do so and then spending the jurors' time arguing about the instructions just before they are to be read disrespects the jury.

5] Jury instructions

Counsel should prepare the jury instructions, themselves, on plain white paper, with only the instruction number and the text of the instruction included. All blanks should be filled in and all bracketed material either deleted or the brackets around same deleted. Since the Judicial Counsel promulgated Rule 2.1055 (above), there is no longer any need to print the boxes identifying the requesting party, authority for, and outcome of the instruction at the top of the jury instruction (nor to print the instructions on perforated paper). (LASC 3.170.)

6] Exhibit list

The exhibit list should identify all potential exhibits to be introduced at trial. If any side objects to an exhibit, the objection should be articulated on the exhibit list. The FSC should not be the first time opposing counsel becomes aware of an exhibit. The exhibit should have been exchanged and discussed when counsel met and conferred in preparation for the FSC. At the FSC, be prepared to explain that objection. This is all to avoid sidebars during trial, and, again, to be mindful of our jurors' experience as jurors.

(As an aside, deposition transcripts and discovery devices/responses are not exhibits and do not need to be listed on the exhibit list or produced in the exhibit book.)

7] Exhibit book

By the time of the FSC, all exhibits should have been exchanged and marked and organized into an exhibit book. You should have all your exhibits available to discuss at your pre-FSC meet and confer. The exhibits in the exhibit book must correspond with the exhibits on the exhibit list. Each page of each exhibit should have its own identifying mark. For example, if Exhibit 3 has four pages, each page should be marked consecutively (i.e., 3.1, 3.2, etc.). (LASC Rule 3.53.) Bring a copy of the exhibit book to the FSC so the Court can see that all exhibits are properly marked and can view any disputed exhibits. The Court will only need one exhibit book at the FSC, but at trial, each counsel, the witness, the Court's clerk, and the Court will need their own exhibit book.

8] Use of depositions in lieu of live testimony

If any party intends to use deposition testimony in lieu of live witness testimony, the party shall meet and confer and jointly prepare and file a chart with columns for each of the following: (1) the page and line designations of the deposition or former testimony requested for use, (2) objections, (3) counter-designations, (4) any responses thereto, and (5) the Court's ruling.

9] Verdict form

The parties should prepare a joint verdict form. If the parties cannot agree on a joint form, they should prepare separate forms and be ready to discuss the issues with the other party's proposed form.

Following your pre-FSC meeting, counsel should prepare and file joint documents (apart from the exhibits) five court days prior to the FSC.

The final status conference

At the FSC, trial counsel should appear in person and be prepared to *address* each of the items contained in the trial notebook. They should be prepared to justify the calling of each witness identified and the introduction of each exhibit sought to be introduced. If you haven't already, you should be prepared to reach stipulations on certain evidence. You should be prepared to provide the court with reasonable and accurate time estimates for trial. LASC Rule 3.25(h) provides that if the time estimate of either party is exceeded, the court may, in its discretion, deem one or both parties to have rested, deem the matter submitted, continue the trial to a new trial date, or declare a mistrial.

Counsel should be prepared to discuss the areas of proposed voir dire interrogation to be directed to prospective jurors and whether there is any contention that the case is one of "unusual circumstances" or contains "unique or complex elements, legal or factual" within the meaning of Standards of Judicial Administration, Standard 3.25, such that usually improper voir dire questions may be asked or limited preinstruction concerning the law may be appropriate.

Counsel should be prepared to discuss whether the court should read the statement of the case or allow counsel to give mini-opening statements to the prospective jurors. (LASC Rule 3.73.)

Counsel should discuss any issues relating to accommodating counsel, party, witness, or juror disabilities.

Counsel should be prepared to discuss what happens if sitting jurors are excused.

Counsel should be prepared to discuss how to handle deposition transcripts (original versus certified copies), etc.

Counsel should consider whether there is any evidence that may reasonably be anticipated to be inflammatory or highly prejudicial and potentially excludable pursuant to Evidence Code section 352.

Counsel should prepare to consider and enter into various stipulations at the FSC. For example, the Court may request counsel to stipulate in writing that:

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(1) Unless called to the attention of the court, all jurors will be deemed to be in the jury box and in their proper places upon court reconvening after each recess or adjournment.
(2) After having given the admonition required by Code of Civil Procedure section 611, the court at each subsequent recess or adjournment need not repeat or remind the jury of the admonition theretofore given.
(3) In the absence of any counsel the court may:

(A) upon the request of the jury, read to the jury any or all instructions previously given;
(B) have read to the jury, at its request, any portions of the evidence given in the trial and may supply the jury, on its request, with any of the exhibits received in evidence;
(C) call the jury into the courtroom to ascertain whether a verdict is probable, to receive the verdict of the jury and poll the jury; and
(D) in the event of the failure of the jury to reach a verdict, permit the jurors to separate and resume their deliberations on the morning of the next court day or such other time as may be fixed by the court.

The Court may ask counsel to stipulate that, in the absence of the trial judge after the original submission of the case to the jury, any judge of this court may act in place of the absent trial judge up to and including the time of discharge of the jury.

The Court may ask counsel to stipulate that in the event of a judgment in favor of the plaintiff, a stay of execution may be issued to be effective for a period of 10 days after determination of a motion for a new trial or until 10 days after expiration of the time to file notice of intention to move for a new trial.

Counsel should be prepared to discuss what demonstratives, if any, may be used in opening statements. All of this with the goal of making the trial go smoothly and efficiently.

Conclusion

History tells us that if we don't work to maintain our institutions, they can be lost in a moment. We must never take the right to a jury trial for granted. We must diligently work to preserve civil juries. This requires that we respect our jurors' time and instill in them a belief that their work is important. Counsel's role in this exercise is working together to be prepared.


Crowley

Hon. Daniel M. Crowley was appointed by Governor Jerry Brown in 2018. Since April of 2023, he has presided in Dept. 71 of the Los Angeles Superior Court, which is an Independent Calendar courtroom. Previously, he presided in one of the Court's Personal Injury Hub courts, and before that he had a brief sojourn in a criminal assignment. Prior to his appointment, he was a trial attorney with Booth, Mitchel & Strange, LLP, *where he was managing partner.*

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