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PRACTICE TIP

Making the Judge Happy

By George W. Soule

Making the judge happy will help you be more effective at trial. If you follow the rules and procedures, and help the trial run smoothly, the judge may listen to you better and credit your argument. The judge's reaction to your presentations may also influence the jury's feelings about you and your case. You may gain acceptance or favor with a judge by being prepared and organized, acting professionally, and learning from experience. This article suggests specific ways to help make your product liability trial successful.

1. Follow the Judge's Standing Orders and Courtroom Procedures

Most judges have standing orders that specify many pretrial and trial requirements. You should diligently abide by these orders. Judges may have additional, unwritten requirements or preferences for trial submissions and courtroom procedures or etiquette. For example, in some courtrooms, you may not re-cross-examine a witness or you may have to tender a witness as an expert before you can ask for opinions. Some judges have expectations as to where lawyers may stand when they are questioning witnesses

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Ethics of Settlement

Restricting Plaintiff's Counsel from Representing Future Claimants

By Jennifer Smith Finnegan

After years of litigation, your client, Widget Manufacturing Co., has reached an agreement to settle Plaintiff's design defect claims relating to Widget's top-selling product. Both sides have devoted significant time and resources to the lawsuit: Thousands of pages of proprietary information have been produced by Widget to Plaintiff's counsel under the terms of a protective order; dozens of witnesses have been deposed, expert reports exchanged; and extensive briefing on the legal issues submitted.

Widget's CEO is happy with the decision to settle, but is worried that this costly litigation arises from nothing more than a personal vendetta by Plaintiff's lawyer, Sue Orbesood. He believes Ms. Orbesood intends to make a career out of suing Widget. Because the desire to get Ms. Orbesood out of its hair was central to Widget's decision to settle, Widget's CEO instructs you to include in the settlement agreement the following provisions:

- Ms. Orbesood will not represent future claimants in product liability cases against Widget;
- She will keep the facts, terms and amount of the settlement confidential;
- She will not advertise the fact that she prosecuted a product liability action against Widget and shall not use Widget's name in any advertising or promotional materials;
- She will not solicit individuals with potential product liability claims against Widget, nor refer them to other counsel, nor share a fee with other counsel in connection with such claims; and
- She will not only return all confidential documents produced during the litigation pursuant to the terms of the existing protective order, but also all of her work product, which she will not use to aid any future claimants.

In return, Widget will reimburse half of Ms. Orbesood's expenses relating to litigation, in addition to the settlement amount already agreed upon between

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the parties. If Ms. Orbesood will not agree to these terms, Widget CEO's suggests, as an alternative, that Widget offer to retain Ms. Orbesood as a legal consultant. Widget would pay her a monthly fee to be "on call" to advise it in connection with product liability claims as they arise. The agreement would be memorialized in a separate retainer agreement entered after the settlement with her client is consummated. Ms. Orbesood would be providing valuable insight to help Widget minimize its exposure to future lawsuits, and the arrangement would have the intended result of conflicting her out of taking any cases against Widget in the future.

Is This Ethical?

Can you ethically seek to include in the settlement agreement any of the provisions Widget wants in the settlement agreement? Can you ethically negotiate the side retainer agreement between Widget and Ms. Orbesood to conflict her out of future cases? The answer to both questions may be surprising: no. Despite how desirable such terms may be to the parties in the case, Ms. Orbesood and you could both face disciplinary action for violating the rules of professional conduct if any of these terms are negotiated or become part of a settlement of the case. *Restraints on a lawyer's right to practice law as part of a settlement of client controversy are strictly prohibited*.

The rules of professional conduct of all 50 states include an express prohibition against a lawyer participating in making — or even offering — an agreement in which restriction on a lawyer's right to practice law is part of the settlement of a client controversy. *See* ABA Model Rules of Prof'l Conduct, Rule 5.6(b), upon which most states' ethics rules are based; Cal. Rules of Prof'l Conduct, Rule 1-500. Many jurisdictions have also found that agreements violating this rule are void as a matter of public policy. *See, e.g., Cardillo v. Bloomfield 206 Corp.*, 411 N.J. Super. 574, 580 (App. Div. 2010); *Jarvis v. Jarvis*, 12 Kan. App. 2d 799, 802 (1988). Lawyers have received sanctions ranging from public reprimand to disbarment for their involvement in such agreements.

Reasons for the Rule

There are three policy reasons for this rule. First, such agreements restrict the public's access to lawyers who may be the most capable to handle a particular claim. This public policy favoring full access to qualified legal counsel is perhaps the most oft-cited reason for the rule. Second, such a settlement may provide a client with rewards that bear less relationship to the merits of the claim than to the defendant's desire to "buy off" plaintiff's counsel. Third, such agreements create a conflict of interest between the lawyer's present clients and potential future clients. ABA Comm. on Ethics & Prof'l Responsibility Formal Ops. 93-371 and 00-417.

The last two policy reasons address the conflict of interest that arises because the financial interests of the lawyer, as well as the interests of future clients, become considerations in the settlement, instead of solely the actual merits and circumstances of the current controversy, considered through arms-length negotiation. It is the interest of the clients in the current controversy that must be the negotiating lawyers' focus — not questions of whether plaintiff's attorney will or can agree to restrict his or her future practice, nor the value to defendant to "get rid" of plaintiff's counsel. Because of these policy interests, Rule 5.6 is a bright-line rule prohibiting lawyers from even suggesting such restrictions in the context of settlement negotiations. Even if Widget and Ms. Orbesood's client want the

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Cases Involving a Party Who Is a Minor

By Courtney E. Vaudreuil

While product liability attorneys are often cognizant of issues relating to standing of their clients and opponents, the unique posture of minor children may be overlooked or underappreciated. The law recognizes that the judicial system must ensure that the interests of minors are safeguarded. Therefore, there are established rules and procedures to which the parties must adhere. Failure to follow the requisite steps may result in the nullification of actions taken in product liability litigation on behalf of the minor.

Ensuring Proper Representation of Minors

In most jurisdictions, when a party is a minor, incompetent person, or person for whom a conservator has been appointed, the person must appear either by a guardian or conservator of the estate or by a guardian *ad litem* appointed by the court in which the action or proceeding is pending, or by a judge. If a client or opposing party falls within any of these categories, it is imperative that the party in question is properly represented in the action. *See, e.g.*, Federal Rules of Civil Procedure Rule 17.

Appointment of a guardian or similar representative is usually accomplished by filing a form petition with the court. *See, e.g.*, Cal. Court Forms MC-350. Typically, the applicant must provide basic information relating to the nature of the case, describe why the proposed guardian is competent and qualified to protect the minor's interests, and state that the guardian has no adverse interests. The proposed guardian must also agree to accept the responsibilities and duties inherent in acting on behalf of the applicant's best interest. Such duties include, for example, the maintenance of confidential information that may be learned from the minor's records, health care providers, and mental health care providers.

Practice Pointer: If your product liability case involves a minor, ensure as early as possible in the litigation that there is proper representation. If the opposing party is a minor, meet and confer immediately with opposing counsel regarding the necessity for the appointment of a guardian *ad litem* or other representative of the minor's interest. Any issue of representation should be resolved prior to any compromise or settlement of the action in order to avoid potential difficulties in later enforcement proceedings.

Entering into a Compromise With a Minor

Most attorneys and clients are familiar with the concept that minors may lack the capacity to enter into contractual agreements. While the age of incapacity may differ depending on the jurisdiction, the principle is generally the same — contracts entered into by "infants" are voidable. In accordance with this fundamental precept, minors cannot compromise or settle an action or agree for an order or judgment to be entered for or against them. The guardian or conservator of an estate or a guardian *ad litem* acts on behalf of a minor with respect to these types of decisions, and may only do so with court approval. *See* 43 C.J.S. Infants § 335.

Court approval is obtained via a petition to approve a minor's compromise. The purpose of the petition is to provide the court with sufficient information to evaluate the fairness of the compromise to the minor. Thus, the court will look not only to the settlement amount for the minor, but also will look at any other settlements for other parties and whether the minor's settlement is fair by comparison. While review of the petition is pending, the compromise remains voidable by the minor or minor's guardian.

To evaluate whether the compromise is in the best interests of the minor, the court may consider the nature of the tort claims, any injuries suffered, settlement offers broken down by each defendant, terms of the settlement, settlements offered to other parties, the justification for settlement apportionment between the parties, amounts of medical expenses and sources of payment (*e.g.*, amounts covered by insurance), total amount of attorney's fees, and a detailed description of the method for distribution of settlement amounts for the minor (*e.g.*, trust, payment to a custodian, annuity). This detailed review can require the production of records such as doctors' reports containing diagnoses and prognoses, medical liens, and attorney's fee agreements. Some courts also require that the minor and the person acting on the minor's behalf personally appear at the hearing to approve the minor's compromise. The court may also require attendance and testimony of witnesses, such as an examining physician.

The court's authority is broad, and it has the power to compromise a minor's claim even over the dissent of the minor's parent or guardian *ad litem*. Federal courts applying state law for the review of minor's compromises have gone as far as to evaluate the reasonableness of the petition and adjust the terms of the settlement, including fees and costs taken from the minor. In making a reduction of fees and costs, the court may evaluate the skill, diligence, expertise, and time spent by the minor's attorney. The fact that the minor's guardian has approved the attorney's fees does not relieve the court of its duty to assess their reasonableness.

Some states require that proceeds of a minor's compromise be held in a "blocked financial investment for the benefit of the minor" and that proof of the establishment of the account must be filed with the court. Setting up such accounts may create challenges for the parties and should be factored into any settlement timelines.

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Court approval provides assurance to the parties that the settlement is final. A court-approved settlement bars the minor from bringing a subsequent action for the same injuries after the minor attains majority. In some circumstances, if the parties do not seek court approval of the minor's compromise, the agreement may nevertheless be ratified if the minor ratifies it after attaining majority.

Practice Pointer: Do not underestimate the amount of time it may take to prepare a minor's compromise and have it approved by the court. Depending on the facts of the case and the involvement of the judge, you may need to present detailed information, as described above, regarding injuries suffered, future care, and the future protection of the financial interests of the minor.

There can also be additional challenges in dealing with the financial accounts established for the minor, such as annuities. For example, some annuities may require that the terms of the annuity be incorporated into the written compromise. Counsel for the minor should determine as early as possible the terms of the accounts that will hold the minor's funds so that any additional requirements by the financial institutions can be factored into the parties' agreement.

Challenges to Maintaining Confidentiality

The vast majority of complaints filed in United States courts are not adjudicated. Instead, most are resolved through some other method, such as mediation, arbitration, and settlement. Confidentiality is often the cornerstone for reaching agreements between parties. The courts favor settlement and endeavor to support the confidentiality of such agreements. However, when settling a claim involving a minor, confidentiality will likely not be an option. The lack of confidentiality is not just a concern for clients, but also for the minor's attorney, who will have to place his or her fee agreement in the public record.

Because court approval of a minor's compromise is required, courts are reluctant to permit the filing of the compromise documents under seal, particularly when the request to do so is based solely on the desire for confidentiality of a settlement sum. There typically must be a compelling interest for filing records under seal. To file the minor's compromise under seal, a party must consult the court's local rules. Typically, a party must file a motion to file documents under seal and lodge the documents at issue with the court for *in-camera* review. If the court denies the request, the petition to approve the minor's compromise will be filed and become part of the public record.

While it may not be possible to keep the settlement amounts out of the public record, the parties may still include provisions in the compromise prohibiting further disclosure, ensuring the settlement amounts will only become known if someone seeks them out in the public record.

Practice Pointer: Try to build safeguards into a minor's compromise to protect the terms from further disclosure. Just because the terms of the compromise are in the public record does not mean that the parties cannot agree to other restrictions on disclosure.

Conclusion

It is crucial that attorneys on both sides of a product liability matter keep in mind the capacity of the parties to sue. In addition to minors, other parties lacking capacity will require similar protection of their interests. Federal rules require that certain challenges to a party's capacity be included in the answer to the pleading or may otherwise be waived. Therefore, it is important to be cognizant of the parties' status at the outset of litigation and any changes in status during the litigation. For example, if a party suddenly becomes incapacitated due to illness or an accident, immediate steps should be taken to ensure that the party's interest is properly represented.

In cases where the incapacitated party is a minor, it is a best practice to be proactive in seeking all required court approvals for representation and compromise. It is also crucial that clients, who may be unfamiliar with the procedures and implications of a court's review of a minor's compromise, be advised of the additional steps that will be required to attain a final resolution of the matter.

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restrictions to be part of their deal, the lawyers are ethically estopped from including them. *See* ABA Formal Op. 93-371; Pa. Bar Ass'n. Op. 95-13 (1995).

The rule has been heavily criticized as being based upon weak policy considerations and as removing very effective bargaining chips from the settlement table, thus impeding strong public policies in favor of prompt and efficient settlements and freedom of contract. *See, e.g.*, Stephen Gillers and Richard W. Painter, Free the Lawyers: A Proposal to Permit No-Sue Promises in Settlement Agreements, 18 *Geo. J. Legal Ethics* 291 (2005); Yvette Golan, Restrictive Settlement Agreements: A Critique of Model Rule 5.6(b), 33 Sw. *U. L. Rev. 1* (2003)).

There is also contradictory legal precedent in a few jurisdictions holding that such agreements are legally enforceable, regardless of whether they raise disciplinary issues for the lawyers involved. *See Lee v. Florida Dep't of Ins.*, 586 So.2d 1185, 1188 (Fla. Dist. Ct. App. 1991);

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Feldman v. Minars, 230 A.D.2d 356, 658 N.Y.S.2d 614, 617 (App. Div. 1st Dep't 1996) (holding agreement restricting a lawyer's practice as part of a settlement was not against the State's public policy). As a direct response to *Feldman*, the New York City Bar Association issued an opinion that, even if such an agreement is legally enforceable, a lawyer may not ethically enter into a settlement agreement that restricts her own or another lawyer's ability to represent one or more clients. N.Y.C. Bar. Ass'n Formal Op. 1999-03

Indeed, regardless of the criticisms of the rule, ethics committees uniformly opine that Rule 5.6(b) unequivocally prohibits a lawyer from participating in any arrangement that directly — or indirectly — restricts a lawyer's right to practice as part of a settlement of a client's claim. Many of the indirect attempts that Widget's CEO suggests have been found to violate Rule 5.6. Each is discussed in turn.

Agreements to Keep Settlement Terms Confidential

Agreements to keep settlement terms confidential or to limit attorney advertising and solicitation may violate the rule.

While settlement agreements requiring the parties to keep confidential the private terms of a settlement are permissible, confidentiality agreements that extend to information that is a matter of public record are not. Such agreements are construed to violate Rule 5.6 by having both the intention and effect of prohibiting counsel from "informing potential clients of their experience and expertise, thereby making it difficult for future clients to identify well-qualified counsel and employ them to bring similar cases." D.C. Bar Legal Ethics Comm. Op. 335 (2006); *see also* N.H. Ethics Comm. Adv. Op. 2009/10-6; Alaska Bar Ass'n Ethics Comm. Op. 2000-2; N.M. Ethics Comm. Op. 1985-5.

In the same vein, restrictions on a lawyer's right to advertise his or her involvement in a lawsuit against a company, to solicit future clients, to contact potential claimants about actions against the defendant or to refer potential clients to other counsel to handle such matters also have been found to violate Rule 5.6. *See* ABA Formal Op. 00-417; Colo. Ethics Op. 92; Ariz. Ethics Op. 90-06 (1990).

Agreements governing confidential information cannot be construed to bar a lawyer from future representations. While protective orders and agreements prohibiting the disclosure of confidential information are enforceable and ethically permissible, restrictions on any use of information gleaned from a current representation in future representations can also violate Rule 5.6. This is because the only way a lawyer could effectively comply with such a broad restriction on 'Use" of information he or she has learned the context of the settled matter would be never to represent another client in any matter that touched on the same facts or information. *See* ABA Formal Op. 00-417; N.Y. State Bar Ass'n. Op. 730 (2000).

Several variations on the theme of limiting a lawyer's future use of information have been held to violate Rule 5.6, including agreements:

- Not to subpoena specified documents or witnesses in the course of representing non-settling claimants (Colo. Bar Ass'n Formal Ethics Op. 92 (1993);
- Barring a settling lawyer from using certain expert witnesses in future cases imposing forum or venue limitations in future cases (*Id.*);
- Requiring a lawyer to turn over her entire file, including work product (N.M. Formal Op. 1985-5); and
- Not to disclose a published study that resulted in a manufacturer's changing its product's warnings (N.H. Ethics Comm. Adv. Op. 2009/10-6).

Agreements to "keep confidential interpretations of the law" may also run afoul of the rule. The Illinois State Bar Ethics Committee opined that an agreement restricting a lawyer from divulging the contents of an accountant's report on tax obligations violated the spirit of Rule 5.6 because it would create a conflict of interest between his present clients and his future clients who may also benefit from the interpretation of the tax laws contained in the report. Ill. State Bar Adv. Op. 11-02 (2011).

Nor may protective orders governing the use of confidential information during the course of litigation be construed to disqualify a lawyer from representing other clients involving similar facts in future cases. *See Hu-Friedy Mfg. Co. v. Gen. Elec. Co.*, 1999 U.S. Dist. LEXIS 11213 (N.D. Ill. July 19, 1999).

Agreements to "conflict out" the adversary's lawyer from representing future claimants violate the rule. Widget's suggestion that it hire Ms. Orbesood to conflict her out of future representation adverse to Widget also violates Rule 5.6. Lawyers have faced significant sanctions as a result of making such "side agreements" in conjunction with settlements of a current client's claims.

Cases in Point

Lawyers in Oregon were suspended from practice for a year for negotiating a side agreement with the defendant to serve as its legal consultants after the conclusion of a global settlement of their 120 clients' claims. The agreement violated Rule 5.6 even though they made attempts to separate the negotiation of the settlement and the engagement. *In re Brandt*, 331 Ore. 113, 121 (Ore. 2000). In *Fla. Bar v. St. Louis*, 967 So. 2d 108, 125 (Fla. 2007), the sanctions were more severe. The lawyer's firm negotiated an engagement agreement with the defendant at the same time it was negotiating settlement of 20 clients' claims for alleged damages caused by the defendant's recalled product. Pursuant to the engagement, the defendant agreed to pay the lawyer's firm $6.5 million, purportedly for future, unspecified legal work. The true purpose of the

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engagement was to create a conflict so that the firm would not be able to represent future claimants adverse to defendant. The lawyer was found guilty of violating several ethics rules, including Florida's version of Rule 5.6, and was disbarred and ordered to disgorge fees paid to him by defendant.

Not just plaintiffs' lawyers are subject to sanctions. The New Jersey Disciplinary Review Board publicly reprimanded both defendant and plaintiff's counsel for their involvement in an agreement restricting the plaintiff's right to practice. *In re Gormally*, 212 N.J. 486 (N.J. Dec. 19, 2012). *In Adams v. Bellsouth Telcoms.*, 2001 U.S. Dist. LEXIS 24821, *45 (S.D. Fla. Jan. 29, 2001), the defendant's counsel was ordered to complete five hours of ethics courses and provide a copy of the court's decision to the regulating authority of any state bar to which they are admitted.

What to Do?

So what should you do when faced by requests for restrictive covenants in settlement agreements similar to those posed by Widget? The guiding principle for such a situation can be summed up as follows: When settling a client controversy, do not offer or agree to any provision that would restrain a lawyer's exercise of independent judgment on behalf of other clients to an extent greater than that of a lawyer who is not subject to the settlement agreement. N.D. State Bar Ethics Comm. Op. 1997-05 (1997); Colo. Ethics Op. 92. Put another way, when settling a client's claim, do not offer or accept any agreement that imposes any obligations or restrictions on a lawyer that exceed or contradict with the obligations and restrictions set forth in ethics rules and applicable law. Tex. Ethics Op. 505 (1994).

Where does this leave Widget and its discomfort with the thought of Ms. Orbesood as its adversary in the future? There are alternatives to provide them with at least some peace of mind. You could ask Ms. Orbesood if she has any other cases against Widget waiting in the wings or if she presently intends to represent any other clients in cases against Widget. If she is willing to answer that question and the answer is no, it likely would not be seen as a restriction on her right to practice to have her make such a statement as part of the settlement. *See DeSantis v. Snap-On Tools Co.*, 2006 U.S. Dist. LEXIS 78362, *34 (D.N.J. Oct. 27, 2006) (similar statement made in class action settlement agreement did not restrict class counsel from deciding to represent clients adverse to defendant in the future).

Of course, Widget also is not precluded from seeking to hire Ms. Orbesood as a legal consultant post-settlement — just as long as the idea is not even remotely broached with her during the settlement of her client's claims.

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or addressing the jury. Most judges require the parties to meet and confer on motions and many other aspects of trial practice. Before your next trial, research resources available online, talk to the judge's staff, check with other lawyers who have tried a case before the judge, or watch a trial to learn these requirements.

2. Make your Pretrial Submissions Reasonable

Most "[t]rial judges are generalists. … They know a little about a lot. … " Peter R. Bornstein, Persuading a Cold Judge, *Litigation*, Winter 2009, at 28. Research your judge's experience in product liability cases. The amount and depth of information needed to assist the judge may depend on whether he or she has tried product liability cases on or before taking the bench.

You should submit a trial brief unless the judge will not allow one. A trial brief will give the judge and clerk an overview of your case and help them prepare for trial. The trial brief should be concise, not an in-depth exposition on every expected issue. In a product liability case, acquaint the judge with the product and how the accident happened, and highlight important evidentiary and legal issues.

Many judges do not like motions *in limine* because often lawyers file too many and make them too general. Such motions, however, help the judge understand important legal issues and manage the trial. The judge will want to discuss issues such as admissibility of other accidents or subsequent remedial measures before trial. Motions *in limine* should be reasonable in number and length. Resist the temptation to file generic "omnibus" motions or rehash issues resolved at summary judgment.

To reduce the number of motions, confer with opposing counsel to determine which issues will be contested. Make your briefs concise, and specify exactly what evidence you wish to preclude. If there are many motions *in limine*, make a checklist so the judge can keep track of which motions have been granted, denied or deferred.

If there are significant *Daubert/Frye* challenges to experts, ask the judge to schedule the hearing on those motions well in advance of trial. Rulings on such challenges may obviate many motions *in limine* and other trial issues.

Streamline your exhibit list as much as possible. In many product

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liability trials, both sides list hundreds of exhibits and use only a fraction. Some judges require the parties to submit copies of exhibits; the result can be many voluminous notebooks that are cumbersome at trial. Work hard before trial to list only exhibits you are reasonably likely to offer. Determine whether the judge expects you to list scientific articles, even though they will not be admitted, or impeachment evidence.

3. Be Prepared

"Preparation is the hallmark of the good trial lawyer. It is also a sign of respect for the judge, the jury, and the entire judicial process." Richard B. Klein, A Dozen Ways to Anger a Judge, *Litigation*, Winter 1987, at 5.

Judges like lawyers who know their case and are prepared. Have your witnesses ready to testify and alert the judge to scheduling problems. When you examine a witness, have paper or electronic exhibits ready to use. Understand the process for qualifying an expert in the jurisdiction. Take time to practice with courtroom technology so there are no interruptions.

When you lay foundation for a critical exhibit or opinion, have an outline or a copy of the evidence rule at counsel table or podium to guide you in your examination. Be prepared with impeachment materials and know how to use them to impeach a witness.

4. Be Honest

Be faithful to the facts and the law in your presentations to the court and jury. You will gain credibility with the judge by staying true to the record and law. Answer the judge's questions directly. "[N]ever try to blow smoke at the court. …" Sylvia Walbolt, Twenty Tips from a Battered and Bruised Oral-Advocate Veteran, *Litigation*, Winter 2011, at 55. If you make a mistake, "correct it at the earliest opportunity." James W. McElhaney, Talking to Judges, *A.B.A. J.*, Feb. 1991, at 90. Apologize if appropriate.

Keep your promises to the judge and jury. If you say you have only 10 minutes of questions, keep your examination to 10 minutes or less. If you say you have only one more question, then make it one question.

5. Preview Issues So There Are No Surprises for the Court

While counsel will not want to divulge trial strategy, some sharing of information is necessary to avoid surprises for the judge and interruptions in the trial. Show opposing counsel your exhibits and electronic presentations to be used in opening statements. Avoid using contested exhibits or argument in your opening statement, or obtain a ruling from the judge well in advance.

When you intend to offer a controversial exhibit, alert the judge in advance. The court may wish to hear argument or consult legal resources to be prepared to rule on the exhibit. In a product liability trial, counsel may wish to display the actual product, an exemplar product, model, accident simulation, or product testing. Each of these strategies may implicate significant issues affecting their admissibility. Give the judge an opportunity to hear arguments well before you wish to make such displays.

6. Make It Easy for the Judge to Make Rulings

"Lawyers who make judges happy are the ones who make life simple for the judge. I am not talking about the making of decisions; that is part of the job of a judge. What makes life difficult for judges is when information is given to them in a shotgun manner without organization or plan." — Former Minnesota Trial Court Judge

7. Be Organized in Your Submissions

Make sure the judge can quickly get to the heart of the issue. In many cases, the parties will submit prior testimony to be read or displayed by video. Often, such testimony is repetitive and boring. Streamline deposition designations as much as possible. Alert the judge well in advance when rulings must be made on objections to such testimony. Highlight a transcript with the parties' designations and flag the testimony to which objections are asserted. Edit video depositions to delete objections and stricken testimony well in advance of their display to the jury.

In most cases, you can agree with opposing counsel to submit a joint set of preliminary jury instructions. Submit separately only the instructions on which you cannot agree. Most judges are reluctant to depart from pattern jury instructions. When you submit requested instructions, make it clear (with underlining or strikethroughs) how you have changed pattern instructions.

Prepare pocket briefs — just two or three pages in length — dealing with specific legal or evidentiary issues that may arise at trial. A quick read of relevant authorities will assist the judge in resolving these issues.

8. Be Professional in the Courtroom

Show respect for the judge, jury, courtroom staff and opposing counsel in all your courtroom dealings. "[C]ivility is not a sign of weakness, and … incivility and intemperance may be perceived as signs of weakness … and disorganization." Susan Steingass, A Judge's 10 Tips on Courtroom Success, *A.B.A. J.*, Oct. 1985, at 71.

Always stand when addressing the court or jury. Not only does standing show respect (and is required by most courts), it will make your presentation more effective. *Voir dire* will be your first chance to discuss your case with the jury. Do not be argumentative or ask for commitments from prospective jurors to support your case. Object only to questions where the answers really matter. State your objection and briefly state the ground or rule; do not make speaking objections. Do not request excessive bench conferences. Judges hear many objections every day; they can usually deal with objections without argument.

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In addition, do not address witnesses or refer to others by first name, unless the witness is a child. Use formal names in the courtroom that do not suggest familiarity. Keep a straight face in the courtroom. Do not exhibit disapproval to the judge, witness or opposing counsel with facial expressions or body language. Do not disrupt opposing counsel's presentation. Do not signal answers to a witness. Do not distract proceedings by rustling papers or loudly conferring with co-counsel. In legal arguments, address the court, not opposing counsel. Be professional in dealings with opposing counsel, and do not denigrate them to the judge or jury. Give your opponent reasonable notice as to when you will call specific witnesses, and expect the same courtesy from your opponent. Often, counsel can agree to exchange the names of the next day's witnesses at the end of the trial day.

Prepare your clients and witnesses to abide by these same rules. They should also be instructed on courtroom rules and cautioned not to violate motions *in limine*. They must not cause distractions in the courtroom.

9. Move the Trial Along

If there is a chance of settling the case, resolve settlement discussions before trial. Settlement talks during trial are distracting and time-consuming. The judge will not want the jury to sit idly while you explore settlement.

Generally, the parties should stipulate as to authenticity of exhibits unless there is genuine dispute. Counsel should agree upon one set of basic exhibits such as medical records or product manuals. It will be confusing to have the parties refer to two or more versions of the same documents.

You will want to emphasize your trial themes, but you should avoid excessive repetition. Calling multiple witnesses to address the same issue, eliciting overlapping expert opinions, and repeating questions with the same witness will try the court's patience. If counsel anticipates a problem with a witness or exhibit, raise the issue with the judge in advance, so the judge can hear and resolve the issue before it is time to call the jury. Do not waste the jury's time by raising legal issues when you should be presenting evidence.

10. Think Like a Judge

After you have tried several cases, you will gain insights into how judges make decisions at trial. When dealing with an important trial issue, put yourself in the judge's place. How is the judge likely to perceive the situation? What information would be helpful to resolve the issue? How can information or arguments be presented to make it easier for the judge? What resolution will move the case along, avoid prejudice to all parties, and preclude appeal issues? Your arguments and briefs should be fashioned to make it easier for the judge to rule in your client's favor.

11. Treat the Judge's Staff Respectfully

Show the same respect to clerks, court reporters and bailiffs as you show the judge. Being respectful is the right thing to do, but also the judge will know if you are not treating courtroom staff well.

Assist staff members with their duties. Speak clearly for the record and provide the court reporter with spellings for names and technical terms. At the end of each day, someone on your trial team should help the clerks reconcile exhibits referenced that day. Assist clerks in tracking which exhibits were offered, admitted or denied, and in gathering exhibits for the record. In addition, provide courtesy copies of briefs and other filings to the judge and law clerks. Check on whether they prefer electronic or hard copies or both.

12. Treat an Unfriendly Judge Respectfully

Most judges will try to provide an even playing field to all parties. You may occasionally encounter a judge who does not like you, your client, or your case. The judge may snarl at your arguments, refuse your entreaties for bench conferences, and overrule your objections to all but the most outrageous of your opponent's tactics. Still, you should remain professional and respectful and resist the tendency to react in kind. The jury hopefully will reward you for your best behavior.

In these cases, you may be able to turn the judge around by persistent professionalism. If not, you must make a record of the judge's conduct so you can address it on appeal, if necessary. Insist upon on-the-record discussions and submit written offers of proof. In extreme cases when judges roll their eyes or exhibit other prejudicial body language, it is necessary to recite these instances on the record.

Conclusion

Your goal at trial should be to achieve the best results for your client, and to do so, you need to be the most effective advocate. But "most effective" does not mean a "take no prisoners" approach to advocacy. Making the judge happy will help you be more effective. You are likely to win the judge's favor by being prepared, organized and professional.

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