

# Remembrance of a Trial Past

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There's nothing like a month-long trial before a superior court jury to simultaneously invigorate and exhaust a business litigator accustomed to resolving disputes through the manly art of settlement. A few random thoughts on the experience:

## Voir Dire Excitement

There are many procedural avenues for selecting a jury. Some judges call up 12 members of the jury panel, permit them to be questioned, and then, as each lawyer exercises a peremptory challenge, a new face is summoned from the audience, questioned and subjected to the same challenge process.

There is another approach, which may take a little more time but provides for an exciting finish to the process. By seating a "double jury," that is, 24 prospective jurors, and questioning them all for cause before any peremptory challenges are exercised, and by assigning them numbers, 1 through 24, the peremptory challenge phase goes remarkably quickly. Under this system, strikes are permitted with respect to any jurors 1 through 12, and if any challenges are exercised, both sides know that juror No. 13, then No. 14 and so on will take the challenged jurors' spots. The bottom line is that the peremptory challenge phase lasts a matter of minutes, and the lawyers must keep their wits about them during an intense period that obviously has much to do with the outcome of the case.

## Business Litigation

## Opening Statement

Two lessons emerge from this phase of the trial: Practice the speech, and start with your strong suit. Unlike virtually every other phase of the trial, the opening statement affords you the luxury of rehearsing. Normally, by the time final argument rolls around, you may not have the time or energy to practice. If you put in two full-dress rehearsals of your opening statement, you will be amazed at how much better the third version is — the one you actually give in front of a jury — than the first practice session.

As for leading with your strength, the importance of this idea cannot be overemphasized. Although you have a jury's attention when you first stand up, the easiest thing in the world is to lose them if you don't provide some excitement very early in your talk.

## Examination of Witnesses

Here, less is almost always more. Whether on direct or cross, the tendency of most lawyers is to plow a lot of unfertile ground, while occasionally turning up a nugget. Nothing angers a judge more quickly than needlessly repeating a point, or going through background information of marginal importance. If in doubt, leave it out.

## Jury Instructions

Jury instructions are the panel's lifeline to the judge, and therefore extremely important. Even if the court doesn't insist on submission of instructions in advance of trial, prepare them anyway. Your schedule inevitably becomes far too clogged to devote sufficient thought to formulation of instructions during trial.

As for non-BAJI instructions, be

sure to have a ready explanation for why the court should consider issuing them. "It's the law" won't cut it; instead, be prepared to explain why facts unique to your case require a special instruction.

## The Disappearing Jury

Enduring protracted jury deliberations is difficult enough, without the introduction of truly bizarre developments. Consider the following events: During the fourth day of jury deliberations, after more than a dozen questions have emerged from the jury room over that span, the jury asks the court whether it may find in favor of the plaintiff, but award the plaintiff no money damages. At this point, the plaintiff informs the court that, nothing personal, but he would like to waive his right to a jury trial.

The defendant, on the other hand, encouraged by the last question, says not so fast, it will be happy to start paying the jury fees. The question then arises, may a defendant "pick up" the jury when it never before requested a jury trial? The answer is yes. Code of Civil Procedure section 631(8), while hardly a model of clarity, indicates that after a party who has demanded a trial by jury waives such a trial, the "other party" may also waive its right to a jury trial by "failing to promptly demand a trial by jury" before the judge in whose department such waiver was made.

The effect of this statute is clarified by *Middlesex Insurance Co. v. Mann*, 124 Cal.App.3d 558 (1981), where the court stated: "A trial cannot be a jury trial as to one party and a court trial as to the other; once jury trial has commenced, the jury may not be dispensed with at the instance of the party who requested it without affording the other party or parties an opportunity to demand that the trial proceed as a jury trial."

To the same effect, the California Supreme Court clarified the issue in *Taylor v. Union Pac. R.R. Corp.*, 16 Cal.3d 893 (1976): "When the party who originally demanded jury trial subsequently waives it, the other party has the opportunity to preserve a jury trial by promptly demanding one and depositing the necessary jury fees."

Sounds simple, right? The plaintiff no longer wants the jury, so the defendant picks it up. But what happens if the jury doesn't behave as advertised? What if the jury continues its four-day deadlock, doesn't emerge with a "vote for plaintiff, but give him no money" compromise, and instead appears, by their additional questions

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to the judge, to be truly deadlocked. May the defendant, to avoid a mistrial (and, presumably, a second jury trial) waive the jury, sending the matter irretrievably to the judge?

Again, the answer is yes. But, in the face of a final tactical step by the plaintiff, namely, asking for relief from his waiver of a jury trial, thereby reinstating the jury and apparently guaranteeing a mistrial, how should the judge rule? *Taylor* has the answer. A party may not "try his case before a court without a jury, lose it and then complain that it was not tried by a jury."