GOING FROM TRIAL LAWYER TO TRIAL JUDGE

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Making the transition from trial lawyer to trial judge has been a great journey. The job satisfaction rate among judges is high. Few of us ever will return to private practice, even those who enjoyed being there.

So today I sit in a different seat in the courtroom and see everything from a new perspective. While most of my early insights about judging are not truly new, I wish I had known them better and understood them more fully when I was an advocate. And for those insights that I did know then, I really wish I had learned them sooner and paid more attention to them. It might have made a world of difference.

As I see it, there are few if any judicial secrets. None of these points is a surprise. Rather, they all are common sense and well known, yet each is ignored more often than heeded.

First, get to the point. Fast. We judges typically deal with crowded dockets and multiple issues in each case. Get us to focus on your key points. Organize your case well. Write—and then edit and rewrite—your pleadings, motions, and briefs. Tighten them up, so that they compel the court to focus on what you believe most important. Just because a rule of court gives you 20 pages for your opening brief does not mean that you should take all of them. If you can make your points in 15, then by all means, do so.

Practice and refine your oral argument. Start with your strongest and most important points. At the outset, give the judge a mental checklist of the points you will make and what’s to come as you talk about them. Remember, at oral argument, it’s OK not to cover all the points that are made in your papers.

Recently, in a complicated high-dollar case before me with a lot of issues, one of the most effective oral arguments I have heard began with this:

Your Honor, there are six reasons that respondent should prevail on this issue. Today, I will discuss only four of them. Unless the Court has questions about the other two, I respectfully refer the Court to pages 8 through 11 in our moving papers for point five (statute of frauds) and point six (failure of consideration).

In three short introductory sentences, that attorney alerted the court to the multiple grounds for the relief he sought, the specific issues that he considered most important on which to focus, and where to find the other arguments. He invited questions on those other points if I wished to raise any, but he deferred spending time on them if I did not. A wise move.

Second, know—or swiftly figure out—when to stop talking. There are times when I take the bench predisposed to rule in a certain direction on an issue. Sometimes, based on the protracted oral argument of the attorney I thought would prevail, I have found myself compelled to reconsider.

There’s no one reason this happens. Sometimes lawyers ask for too much; they overreach and it proves counterproductive for them. Other times it becomes apparent during oral argument that the position they had presented in their papers in such a black-and-white, absolutist way, and that I initially had accepted as clear and obvious, is actually more nuanced and less certain. Listening to the attorneys continue to argue for the very outcome that I was inclined to order when I took the bench, I’ve more than occasionally discovered that I had not given due consideration to the contrary points.

The more the advocates go on and on, the more time I have to contemplate the opposing perspective and realize that the other side’s view may have more merit than I originally considered. These types of developments sometimes prompt a positional change on my part, based on the additional information. We are trained as judges to remain open-minded, willing to alter our initial conclusions based on more information, but I sometimes wonder what would have happened if the loquacious lawyer projected to prevail had simply spoken less and sat down.
Early in my legal career, I started to learn this lesson. One of my first arguments as a young lawyer in Los Angeles was at a remote courthouse in the San Fernando Valley. My motion was not even opposed. Regardless, I came to the oral argument fully armed with the top five reasons my client must be right. We must prevail, I thought, and I undoubtedly communicated that with certainty to the court, both expressly and implicitly.

I solidly made my first point. Then, midway through my second argument, the judge leaned forward on the bench and said, “Counsel, when I walked in, I was prepared to rule your way. The more you continue to talk, the more I may reconsider my view.” Hearing that, I sat right down.

What I had failed to do then—and what many attorneys who appear before me fail to do now—is to check in, before launching into argument, about where the judge is, or seems to be, on the issue. Even when the judge does not issue tentative opinions—and many courts do not do so—you may be able to inquire what is on the court’s mind. It never hurts to ask.

Such probing may elicit the response that the attorneys should simply proceed with their arguments. But if you ask first, you may find the court is already at least partially with you or perhaps can identify a few of its concerns.

The most dramatic example of this before me as a judge occurred in a case in which I announced my tentative view on a subject. The attorney with the greatest hill to climb went first. Then came the attorney who was on the side that was projected to prevail. He got to the lectern and said just this: “Your honor, I have listened carefully to my esteemed opponent’s arguments. Nothing she has said dissuades me from the wisdom of the Court’s tentative views. So, unless the Court has any questions, I submit on the tentative.” And then he wisely sat down. So know—or figure out—when to stop talking and when to sit down. Then feel confident enough to do it.

Experienced football teams call this taking a knee. It’s near the end of the game and the likely-to-prevail quarterback kneels down with the ball, rather than risking a fumble, thereby securing his team’s victory.

**Third, bring out and discuss the weaknesses in your case.** Most lawyers know this already, yet few follow it. All cases have negative facts. No judge believes otherwise. We are trained to look for them ourselves and then assess them. You are the one who should bring out the weaknesses of your client’s case and candidly discuss the facts that hurt your side. Then bring them into context and show why your client should prevail anyway.

In a recent hearing before me, a father asked to have 50/50 visitation with his two young daughters. The court papers eloquently and compellingly discussed what a good father he is, how the girls light up in his presence, how he helps them with their homework, how much richer their lives would be with regular and frequent visits with him, and his magnanimous offer to provide all of the transportation to pick up and drop off the girls at their mom’s house.

Only when I got to the mom’s papers did I learn that there was a criminal domestic violence order against him still in effect and that he twice had been convicted of driving under the influence. There was uncomfortable shifting around at counsel table when I sharply questioned his attorneys about why I had to read that for the first time in his adversary’s opposition brief.

Imagine what that does to a judge’s perception of the credibility of the counsel. Plus, the mom’s attorneys got to paint those facts in the way that best suited her position.

**Fourth, come to court organized.** Know where to find your exhibits efficiently, your court findings easily, and your legal authorities quickly. At best, not coming to court prepared to use the judge’s time well draws out the proceeding, compels everyone else to sit quietly and wait while you sort through your materials to find the right exhibit, and gives opposing counsel time to prepare a response. It also increases the odds that, in the heat of the moment, you will leave out points helpful to your case.

As well, coming to court less than fully organized often means that you have not satisfied the meet-and-confer requirements imposed in many jurisdictions (see, for example, California Rule of Court 5.98), which can result in a matter being summarily denied or necessarily rescheduled.

A recent hearing was going well for the father on why he should be entitled to 50 percent credit for the many credit card transactions he paid for during the marriage. The best opposing counsel could come up with was that some of the charges occurred either before or after the 15-month marriage and that a few of the charges were for the husband’s son from an earlier marriage.

I asked the father’s counsel to identify, from the long list of credit card charges, those that were community property. After a long pause, counsel acknowledged that he had failed to break them down. Rather than have me continue the matter to the next available court date nearly three months later, he announced that instead he would not pursue that part of his claim after all. We moved to the next point. Better organization would have permitted him to efficiently support his argument rather than abandon it.

You know all of this—as did I, when I practiced—but given where I sit today, it bears repeating. Just as lawyers regularly discuss judges, we judges often discuss lawyers. Is an attorney credible? Well prepared? Verbose? Respectful? Easy to work with? On time?

These are all topics that we judges find ourselves discussing. While it’s the facts and the law that will carry the day, judges are often aware of attorneys who are on top of things and those who unfortunately are not. So, for the sake of your reputation and good standing as well as the success of your efforts, consider things from our point of view as you undertake to persuade us.