

The LITIGATOR

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Five Tips to Follow When Working With Judges

BY: JILL TELFER, CCTLA VICE PRESIDENT

As trial lawyers, we concentrate most of our efforts on the jury. We take seminars on how to pick a jury, and many hire experts to assist in that regard. We utilize focus groups so that we can see the case from the jurors' perspective. However, in our dealings with Judges, sometimes we fail to use the same energy to understand their perspective. Consciously or unconsciously, we see Judges as barriers which we have to overcome to get our case to the jury. We tend to forget, Judges are people just like us. They want to do the right thing, just as we do. It is our job, as representatives of the consumer, to help Judges do the right thing by presenting our case clearly, concisely, and with sufficient authority (or a damn good argument as why a new interpretation of the law is necessary).

Judges have constraints, just as we do. They have limited resources and time to research each case which comes before them, whether it be law & motion or a trial. As lawyers, most of us specialize in areas such as personal injury, employment, and intellectual property. Judges do not have such a luxury. Even in the law & motion departments, the law & motion Judges are called to make decisions on all aspects of civil law. It is important to recognize these constraints in the courtroom.

To understand Judges further, we must focus on what motivates them. Judges want to be known as being fair, accurate and just. Judges do not like to have decisions overturned. If a Judge must decide between helping the underprivileged or staying within the confines of the law, when wearing the robe, the Judge must choose to stay within the confines of the law. It is our job as trial lawyers to show Judges how in our particular case, helping the underprivileged is consistent with the law.

Five simple yet often forgotten tips to follow when working with Judges are:

1. Keep motion papers as short and concise as possible.

In the first paragraph (preferably the first sentence) identify simply and specifically what you want the Judge to do and why. Judges do not have all day to attempt to interpret your papers and figure out what you want. Make sure you educate them if dealing with an area of law that the Judge may have had limited exposure or experience.

2. Keep Judges updated on the latest case law advancements, even if the matter is under submissions or your papers have already been filed.

After a Judge understands what you want, you have to clearly provide the necessary tools the Judge needs to rule on your behalf. A Judge does not want to be overturned so alert the Judge to any new case law on point, whether or not it helps you or hurts you. If the new case is adverse to your position, distinguish it, but alert the Court. In that way, you establish credibility with the Judge.

3. Judges are not interested in petty disputes between you and opposing counsel.

Defense attorneys want to trap trial lawyers in personal disputes to take the focus off the merits of the case. At all times, you must take the high road and not involve the Court unless the conduct gets to the point intervention is necessary. Judges do not want to waste their time with disputes between attorneys. If the Court's assistance is necessary, keep the personal aspects of the disagreement to a minimum. Convey your position evenhandedly, without emotionally charge words.

4. Do not pull surprises on the Judge during the trial.

A Judge's job is to have control of the Court room at all times. Therefore, delays with the jury present, caused by sidebars or requests for 402 hearings should be kept to a minimum. Appraise the Judge of any potential disagreement as to evidence prior to the Judge calling the jury into the Courtroom. There may be times in trial when you want to surprise the defense with something it has overlooked. If such evidence would cause a delay in the trial, or create the perception the Judge is in the dark to the jury, you should alert the Court immediately prior to introducing such evidence, if it does not damage your case.

5. If you develop the belief you are unable to work with a Judge, remember you can challenge at any stage of the case if the Judge has not made any factual determinations about the case.

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Five Tips to Follow ...

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Sometimes, you may realize, for whatever reason, you may not be able to work with a particular Judge and need to exercise a CCP 170.6 challenge. Merely because a Judge has ruled on a motion for summary judgment in your case, does not mean you or the other side cannot successfully preemptory challenge the Judge.

As a general rule, a challenge of a Judge is permitted under CCP §170.6 anytime before the Judge has commenced the trial or a hearing, whichever occurs first. However, §170.6(2) includes three express exceptions to the general rule: (1) the master calendar system; (2) the all purpose assignment rule; and, (3) the ten day/five day rule. To determine whether a preemptory challenge has been timely filed, the Court must decide whether the general rule or any of the exceptions apply. *Zilog, Inc. v. Superior Court* (2001) 86 Cal.App.4d 1309, 1316, citing *People v. Superior Court (Lavi)*(1993) 4 Cal.4th 1164.

Under the Master Calendar exception, a preemptory challenge of a Judge must be filed no later than the time the case is assigned to trial. (CCP §170.6(2)). A Court is labeled a "master calendar Court" within the meaning of §170.6 if cases are assigned to trial by the following method: A trial - ready case must be assigned to a Court (Department) that is ready and able to hear the case. (*Lavi, Supra*, 4 Cal.4th at 1175, 1185).

The all purpose assignment exception to the general rule regarding the timing of a preemptory challenge of a Judge requires the preemptory challenge to be filed within ten (10) days after notice of the Judge's all purpose assignment. A trial court Judge has an all purpose assignment if two criteria are met: (1) the method of assigning cases must instantly pinpoint the Judge whom the parties can expect to preside at the trial; and, (2) that same Judge must be expected to process the case in its totality. (*Lavi, Supra*, 4 Cal.4th at 1180, See also *Pudus Services, Inc. v. Superior Court* (1999) 72 Cal.App.4d 140, 145.

The Delay Reduction Program found at Government Code 68600 *et. seq.* provides additional deadlines to file a CCP §170.6 challenges to a Judge.

Notwithstanding, §170.6 of the Code of Civil Procedure, in Direct Calendar Courts, challenges pursuant to that section shall be exercised within fifteen days of the parties first appearance. (Cal. Gov't Code §68616(I)) (*Emphasis added.*)

Government Code §68616(I) unambiguously requires a party to exercise a preemptory challenge within fifteen (15) days of the parties first appearance in a direct Calendar Court. A "Direct Calendar Court" within the meaning of 68616(I) is a Court where: (1) cases in that Court are subject to the provisions to the trial Court Delay Reduction Act, and (2) a Judge is assigned to a case for all purposes including trial. *Zilog, Inc. v. Superior Ct.*, *Supra* at 1319. In a Direct Calendar Court, the time limit for filing a Preemptory Challenge is no later than fifteen days after the parties' first appearance in the case.

Pursuant to §170.6(2), a motion for disqualification may not be made after a hearing at which the challenged judge determines *contested fact* issues related to the merits to the case. (*Barrett v. Superior Court* (1999) 77 Cal.App.4th 1). A timely preemptory challenge must be denied if the Judge has presided at an earlier hearing which involved the determination of contested factual issues relating to the merits. CCP §170.6, See *Grant v. Superior Court* (2001) 90 Cal.App.4th 518. Courts have ruled that summary judgement motions do not involve determinations of contested issues of fact and therefore you can challenge a Judge after he or she has ruled on a motion for summary judgment on your case.

In summary, it is important to view your case from a Judge's perspective, understanding the Court's constraints and motivations. Be straightforward and concise in your interactions, and assist the Court as much as possible. However, like all relationships, some work and some do not. So be informed of how to challenge a Judge in the venue of the case, so that you may take the appropriate necessary action if necessary.



Recent Verdicts & Results



MELENDEZ VS. MAXWELL.

This case involved a rear-end collision in Roseville on July 1, 2002. The case consisted of a three-day trial that started on December 13, 2005 before Judge Charles Wachob in Auburn. The defense attorney was Jerry Duncan. Plaintiffs were a 46 year old mother and her 17 year old daughter. They had \$2,550 in property damage. They refused treatment at the scene, and initially were treated for approximately four months, receiving primarily chiropractic care. Daughter was seen at Kaiser immediately following the collision, and then treated with her mother at Charles McCrory, M.D., D.C.'s office. Mother returned for more treatment about eight months later. Daughter returned two years later. Both then had video fluoroscopies. Daughter then had 1CT, and MRI scans of her neck. Total medical at trial were \$6,255 for the mother, and \$6,900 for the daughter. Mother also had wage loss of \$2,311. Defendants hired Lewis Meltz, D.C. to do IMEs and to testify at trial.

Case was arbitrated before Glenn Lawson on December 19, 2003. He awarded the mother \$16,224, and daughter \$11,764. Defendants filed trial de novo. Plaintiffs served 998s for the amount of Glenn's awards. Defendant's best offer was \$8,224 for mother, and \$5,764 for daughter.

Jury awarded \$22,820 for mother and \$51,900 for daughter. The case was brought to trial six times over a two-year period. Plaintiff's cost bill was \$23,532, of which \$15,788 was interest. Defendants paid all the jury and court reporting fees during the trial. Dr. Meltz testified that he was paid \$10,500 for his work in this case. The carrier was Farmers, and the adjuster was Henry Hoyer. Farmers did not dispute the costs and have paid the verdicts.



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Construction Case

BY: THOMAS F. LYTLE, CCTLA MEMBER

Often suppliers of goods or services to a construction project will deliver the goods or services, but with a one-man crew, relying on the general or the framer to supply a spotter or a hose man. In the former a preformed load of trusses to support a roof is delivered by a boom truck (subject to crane safety orders re-spotting) and driver and the general or framer supplies the spotter, typically not trained as such violating the safety orders. A variation is a concrete pumping contractor which supplies the pump and a ground level operator who relies on an unsophisticated employee of the general to hook up the nozzle on an upper floor and pass signals. Through miscommunication by spotter to boom operator a carpenter of the framer or general is stuck by the load and injured. Or, through mishandling of the nozzle and hose, or improper hook-up, high pressure concrete is blasted upon a cement finisher of the framer or general with injuries. Both posed scenarios, actual cases of mine.

Appropriate safety orders apply in both cases. Under *Elsner v. Vegas* 34 Cal 4th 95th safety orders may be used as the predicate for a negligence per se instruction.

When the boom operator relies on the construction company employee as spotter and the concrete pump operator relies on the

general's man to hook up the nozzle, the dereliction of each is imputed to the seller and supplier third party defendants derivatively. See *Marsh v. Tilley Steel*, 26 Cal 3rd 486, 496 "where the tortfeasor is not the plaintiff's employer or co-employee, the statutes by necessary implication preserve for the plaintiff his tortious remedy against the defendant."

Next addressed is the special employment situation in the two cases posed. *Campbell v. Harris-Seybold*, 73 Cal App 3rd 786 holds that even though the injured carpenter or cement finisher has no right of action against his employer, being limited to his WCAB remedies, he still has a 3rd party claim against the lumber yard or the cement pumping company which are charged with the culpability of the spotter and the nozzle rigger/operator.

Prop. 51 comparative negligence has no application since the negligence of the spotter and nozzle man are a form of derivative, respondent superior, liability and therefore, you do not compare.

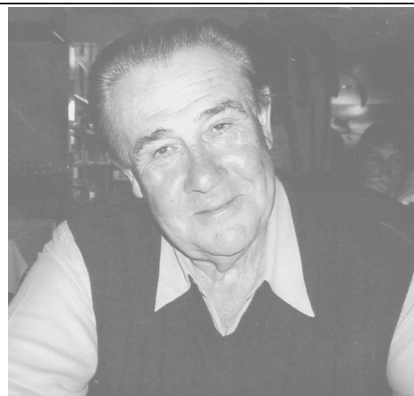
I hope these thoughts are beneficial to fellow CCTLA members.



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REFERENCES:

Call any experienced trial attorney in Sacramento.

Calendar of Events ...

(Capitol City Trial Lawyers Association's Upcoming Activities)

THURSDAY, MARCH 23, 2006

CCTLA Problem Solving Clinic

Topic: TBA • Speaker: TBA

Time: 5:30 to 7:00 p.m. • Location: Sacto Courthouse, Dept. 2

CCTLA Members Only – \$25

FRIDAY & SATURDAY, MARCH 24-25, 2006

CCTLA Annual Tahoe Ski Seminar at Harvey's Lake Tahoe Casino & Resort

For more information go to www.caoc.com or call CAOC to register at 916/442-6902

FRIDAY, MARCH 31, 2006

CCTLA Luncheon

Topic: TBA • Speaker: TBA

Time: 12 Noon • Firehouse Restaurant

CCTLA Members Only – \$25

TUESDAY, APRIL 11, 2006

Q&A Luncheon • Time: 12 Noon • Location: Vallejo's (1900 4th Street)

CCTLA Members Only

THURSDAY, APRIL 27, 2006

CCTLA Problem Solving Clinic

Topic: TBA • Speaker: TBA

Time: 5:30 to 7:00 p.m. • Location: Sacto Courthouse, Dept. 2

CCTLA Members Only – \$25

FRIDAY, APRIL 28, 2006

CCTLA Luncheon

Topic: TBA • Speaker: TBA

Time: 12 Noon • Firehouse Restaurant • CCTLA Members Only – \$25

TUESDAY, MAY 9, 2006

Q&A Luncheon • Time: 12 Noon • Location: Vallejo's (1900 4th Street)

CCTLA Members Only

FRIDAY, MAY 19, 2006

CCTLA Luncheon

Topic: TBA • Speaker: TBA

Time: 12 Noon • Firehouse Restaurant • CCTLA Members Only – \$25

THURSDAY, MAY 25, 2006

CCTLA Problem Solving Clinic

Topic: TBA • Speaker: TBA

Time: 5:30 to 7:00 p.m. • Location: Sacto Courthouse, Dept. 2

CCTLA Members Only – \$25

Contact Debbie Keller at CCTLA at 916/451-2366 for reservations or additional information with regard to any of the above seminars.

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CCTLA Hosts Another Successful Tort & Trial Seminar

The seminar on "What's New in Tort & Trial: 2005 in Review" was held on Tuesday, January 24, 2006 with 58 in attendance at the Holiday Inn with speakers Craig Needham & Patrick Becherer. Special thanks goes to Craig Needham and Patrick Becherer who once again provided a very effective overview of an overwhelming volume of information. If you missed this seminar, the Tort & Trial syllabi is available for \$75. Contact Debbie Keller @ 451-2366 to place your order.

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