Effective Trial Practice: One Judge's View

By Hon. Avern L. Cohn

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What I have to say this afternoon, by and large, applies to the civil side of the docket. The criminal docket and how to handle it effectively presents a separate set of problems worth at least a second lunch.

What I look for today is to offer a way that you can be more effective from the standpoint of time and cost in my courtroom. I only have to be effective as far as time is concerned. I don't have to fill out time slips; I don't have to send bills; I can, if so disposed, take as much time on a single case as I want to. I could, I image, spend the whole twenty year I expect to be on the bench on one case, and leave the rest of my docket for my successor.

You can't do that. But I am surprised when I realize that many of you try.

This phenomenon was particularly apparent in first party no-fault cases which, by the grace of the Sixth Circuit, we no longer have. I would see filed in first party no-fault cases in which the recovery could be no more than three or four thousand dollars where it was apparent that the lawyers had considerably more than that invested.

The first thing you ought to understand is the importance of time and what it costs.

There are, I am sure you are all aware, many differences in the way the judges of the Eastern District operate and manage their dockets. While we all follow (or try to follow) the Federal Rules of Civil Procedure and the Local Rules, they allow considerable latitude. We are perhaps the most collegial group of judges of any metropolitan court of the United States, due in large measure to the leadership of our Chief Judge. However, we are also individuals with rather definite views as to what we want from the lawyers who appear in front of us.

There are, beyond time and cost effectiveness, other principles you should observe. Know something about the court you find yourself in and how it operates; no one knows that better than the deputy court clerk and the law clerks. Ask when you're in doubt. Find out precisely how the judge operates. I encourage my deputy clerk and law clerks to talk to lawyers and tell them what I expect of them.

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You should also understand-and I am not disclosing any secrets-that a judge is the product of his or her antecedents.

Many years ago a European philosopher said,
"The Administration of justice has always contained a personal element in all ages. Social, political and cultural movements have necessarily exerted an influence upon him. Whether an individual judge yields more or less to such influences, whether he is more inclined to follow tradition, or rather disposed to initiate change and innovate, depends, of course, less on any theory of legal methods, than upon his own personal temperament."
You ought to understand something of the judge's personal temperament. It is not difficult. I check yesterday and found that I have thirty-two reported cases indexed in LEXIS. Any lawyer who is appearing in front of me, whose client is spending money in hopes of achieving a good result, certainly ought to take the time to read those cases or at least some of them.

We have an individual docket, something that is not always appreciated. As soon as your case is filed, it is assigned to a particular judge, who usually keeps it from start to finish.

That means that I know your case. Each time I see you I have a pretty fair knowledge of what is going on in the case. Your credibility is always at stake. The way you prepare your papers, the way you keep commitments, these are thing that are going to have a considerable impact on how I approach your case and how I respond to your arguments.

Nineteen out of twenty cases on the civil side of the docket are settled prior to trial. If nineteen out of twenty cases did not settle, I could never handle the load. That means I am continually trying to determine whether your case is part of the nineteen or is that twentieth.

I am never really sure. There is no litmus paper test. I do know I have to keep my eye out for that twentieth case; and you ought to be keeping your eye out as to whether your case is moving toward an inevitable trial, or is reaching the point where there can be a meaningful discussion of settlement.

You are going to see me as your case moves along in three different sets of circumstances. Each calls for a different behavior pattern on your part.

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First, you are going tot see me at a status or pre-trial conference. This is usually an informal appearance designed to find out something about your case and to move it along toward trial or toward settlement.

It is pointless-a waste of your time-for you to come to a status conference, and open by saying, "I'm sorry, judge, it's not my file."

I had two lawyers in front of me recently on what had clearly been scheduled as a settlement conference. One of them said, "I'm sorry, your honor, my partner couldn't be here so he sent me."

This demonstrated indifference was an imposition on the other lawyers and on me. It certainly would have been more appropriate to reschedule the conference, so something more productive could have come out of it.

There is little point to my scheduling a final pre-trial conference to find no one has prepared the final pre-trial statement, and there is no good explanation of why not.

These are the kind of failures that cost your client money. If you have the case on a contingent fee basis it costs you money as well.

You are also going to see me on motions, both procedural and dispositive. Here your behavior patterns change. Now you are trying either to persuade or to obtain an indulgence. You will accomplish neither if you are not prepared, or if you're just a surfer, simply skimming along the top of the issues in your case.

I have often wondered what higher strategy is involved when I am faced with a motion that I am sure to deny, and the likelihood that I will deny it should be obvious to everyone involved. It is the same when someone opposes a motion when it is obvious to all concerned that the motion is going to be granted.

All that happens in these circumstances is that at least one of the lawyers has tarnished his or her credibility. Next time that lawyer comes before me with a motion or request that

is meaningful and important, he or she is in an uphill fight. I've now got a jaundiced eye.

The third circumstance in which you will face me is in trial.

Jury trials are quite different than bench trials. In jury trials I encourage, sometimes even plead for motions in limine. There are always circumstances that pop up, that call for excusing the jury from the courtroom. Issues that create this situation should be brought to my attention up front.

Again, you are wasting your time, you are wasting the jury's time, you are wasting everybody's time, if you bring up issues that force me to have the jury march out. The motion is decided. I bring the jury back. Ten minutes later there is another evidentiary point that has to be discussed at side bar and the jury is marched out again, eventually to be brought back into the courtroom.

Too little attention is paid to jury instructions. Juries in my court are conscientious and hard working. They want to be fair. They take their job seriously. They are entitled to be told the law of the case in plain, simple English, without a lot of legal mumbo-jumbo. There is no reason why ninety percent of a jury's instructions cannot be agreed upon in advance.

I instructed a jury this morning in a trial involving two fairly competent lawyers; yet I spent between six and eight hours with them on the jury instructions. It got to the point where I simply wrote them myself and told those lawyers, "These are the instructions!"

What was worse, when they disagreed, and one of them had a particular point to make on an instruction, he was either unable to reduce it to understandable words and phrases that could be given to the jury, or he chose not to.

I have available boiler plate instructions and instructions from previous cases. You can make copies of them yourself, or we will do it for you. They should be used as a benchmark. It is really frustrating to find that the plaintiff has filed one set of jury instructions, the defendant has filed another, and when I read them, I can't mesh them.

It's like shuffling two decks of card that don't match. A judge is entitled to something more.

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In a bench trial you are trying to persuade me. Here again, your credibility is important. All too often I get a feeling in a bench trial that the lawyers don't have all the facts of their case: they are really finding out about the case as they move through the examination of witnesses.

I insist on witness lists and exhibit lists before trial, as well as proposed findings of fact written in paragraph-by-paragraph form. It helps you and it certainly helps me to follow the proofs as they come in.

As to any of the three sets of circumstances I've just described, know in advance what is going to impress me and know what is going to depress me.

I know that I am impatient with discovery motions. I don't send them to the magistrates because reading and deciding them myself gives me an insight into what the lawyers are really doing to a case.

I am not impressed by contentiousness among lawyers, especially where it is obvious that the lawyers have not talked to each other on a motion, or there is an issue that they ought to be able to agree on. I am also aggrieved by excessive lawyering, overwriting, reams of citations to cases which I am not going to pull down and read. String citations may look great in reported cases; they are not very impressive or persuasive in a brief.

I came to the bench from thirty years in private practice. I think I have a real sense of when the lawyers are part of the problem-which too often they are-and not part of the solution.

I encourage telephone conference calls to resolve discovery disputes. I am willing to indulge a lawyer who can't make it in person to a status conference, and instead asks if it can be done by a conference telephone call with the use of a speaker-phone.

I am willing to try any reasonable measure that will reduce the amount of papers filed, or will expedite the course of a case. But I don't think I ought to be the one who always suggests how to expedite a case.

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I read your motions and briefs. The Eastern District judges are what New York lawyers call "hot judges," meaning that when we go on the bench, we know the case we are going to hear. That means your briefs should be written so they can be read.

I personally do most of my brief reading at home, so I like to have a brief or a motion that is self-contained. It is useless to cite cases with no real explanation of what they say, or where I have to make a note, and when I come down the next morning my law clerk has to pull the case for me.

I would much prefer, rather than a brief with a long exposition on the law, one good case in point.

I recently heard a motion on a summary judgment in an antitrust case, and read two 30-page briefs. I asked my law clerk to call the lawyers and ask each of them to cite to me his one best case, the one case that most approximates his position and the one he really wants to grab me with. That one case is likely to be a lot more effective than the brief.

Labor lawyers, tax lawyers and patent lawyers in particular seem oblivious to the annoyance they generate by citations to reporter systems that aren't in our chambers. The helpful ones file copies of the cases they are relying on, along with their briefs.

These brief observations have been particularly helpful to me. They have allowed me to focus on what I look for from you, and I hop they have afforded you some insight into what will make you more effective with you.

Let me conclude by reading an excerpt from a paper that Judge Charles Joiner wrote for the Antitrust Section of the American Bar Association a couple of years ago. (I have taken some liberties with it.)

This is what Judge Joiner said:

"As you approach a problem I urge you not to forget that courts are not designed to provide detailed and refined results. The kind of justice that comes out of most courts is moderately rough and gross. This is in part due to the amateur nature of jurors who made the decision, to the way in which we attempt to convey information to them, to the way in

which we attempt to influence their decisions through persuasive argument. It is also due in part to the amount of work a judge is required to dispose of, and therefore the limits on his or her time for any particular matter, and due in part, also, to the particular skills of the judge.

The fact is, however, that this rough type of justice does provide an important tool to dispute resolution and if it's permitted to operate in a reasonably simple and straightforward manner. Anything in the system that tends to introduce complication and excessive detail will tend to thwart the system.

A court consists of a judge, one or no more than two able and highly motivated law clerks, and a secretary. The court has the assistance, of course, of the lawyers and in the case of a jury trial, six persons chosen by random means from among society. If you keep it reasonably simple, the courts can help resolve disputes. If you don't, while you complicate the judge's tasks, you certainly complicate your own work and more importantly disserve your client."