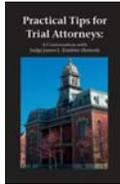


**Practical Tips for Trial Attorneys:
A Conversation with
Judge James L. Kimbler (Retired)**



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Why This Book?

- I love conducting trials
- Jury trials are democracy in action
- But jury trials need trial lawyers
- Trial lawyers speak for those who cannot speak for themselves.
- Believe that I can help trial lawyers

**Two Sections of Seminar:
Pre-Trial Tips and Trial Tips**

- The book covers both pre-trial tips and trial tips
- The book covers 109 pages
- Sixteen chapters
- Not going to cover all of the them
- Will focus on tips I consider important.

Pre-Trial Tips

- The pre-trial tips are:
- A. Know Your Judge
- B. Know Your County/Venue
- C. Know Your Narrative
- D. Know Your Law
- E. Know the Rules
- F. Control Your Client

Know Your Judge

- Interaction with judge starts long before the jury is summoned
- Roberts: The umpire/judge analogy
- Like umpires judges make discretionary calls
- Not usually reason for reversal

Examples of Discretionary Calls

- Whether to grant a continuance
- Whether to allow a motion that is out of time under the local rules of that court
- Whether to allow a witness to be called who is not on your original witness list.
- Whether to conduct a final settlement conference
- Most evidentiary rulings are judged on an abuse of discretion standard

Get the “Book” on the Judge

- What does the judge like during trials?
- Is the judge technical or loose on the rules of evidence?
- Speaking objections allowed or prohibited?
- Wants trial briefs?
- Settlement conference before trial?

Learning the Book

- Finding the “book” on a judge:
- Other lawyers
- Court staff
- Asking the judge
- Online discussion groups for attorneys

Why Knowing the Judge is Important

- Relationships are critical in most human interactions
- Many problems in human relationships are caused by differing expectations.
- Judges are **not** going to change their behavior to match **your** expectations.
- They are going to **expect your behavior to match their expectations.**

Ask if You Don't Know

- If you don't understand or aren't sure of what a judge wants, **ASK**.
- Don't guess
- Don't remain unsure
- Don't feel embarrassed by asking
- Find out.

What If You Are Being "Homered"?

- "Homered" is when the judge in your case is being partial to the other side.
- Usually because of a pre-existing relationship.
- Need to find out whether such relationship exists.
- Doesn't happen very often, but does happen

Things to Do if You Fear Being "Homered"

- Discuss with your client your concerns
- If client is not concerned, do nothing
- If client is concerned or asks you for advice
- Approach judge about client's concerns

“Homered” Steps-2

- Most judges will recuse when told of client’s concerns
- If judge recuses then no problem
- But what if the judge doesn’t?
- Four options, none of them good.

“Homered” Steps-3

- 1. Do nothing provided client agrees
- 2. File a formal motion to recuse
- 3. File an affidavit with the Chief Justice of the Ohio Supreme Court
- 4. File a grievance with the Ohio Disciplinary Counsel.

“Homered” Steps-4

- Personally recommend doing nothing
- Only do 2 if you want to make a record for an appeal or for other proceedings
- Avoid doing 3 or 4.
- 3 rarely works and 4 is fatal to your relationship with that judge and, potentially, his or her colleagues.

Know Your County

- Ohio has 88 counties
- They are often very unique
- Same metropolitan area, different results
- Jury verdicts can be much different

The Problem for Trial Lawyers & Politicians

- Trial lawyers and candidates have the same problem
- Very limited amount of time (campaign) (trial)
- To convince a decision maker (voters) (jury/judge)
- To make a decision that has no impact or no immediate impact on the decision maker's life but is crucial to their lives.

What Does This Mean?

- Decision will be made in the context of the values that the decision maker brings to the process
- **No matter what the evidence is or is not.**
- **You will not change those values through a trial or a campaign.**

Values Are Important

- Not saying that evidence isn't important
- Not saying that trial skills aren't important
- Not saying that jury instructions aren't important
- What I am saying is that the verdict has to "ring true" to the values of the jury members.

Values Are Cultural

- Values are often cultural in origin
- Culture is the behaviors and beliefs characteristic of a particular social, ethnic, or age group. (Dictionary.com)
- People co-exist in several cultures
- Culture of your family, your profession, your workplace, your organizations, your friends, and your community.

Learning Juror's Cultural Values

- Very difficult
- Limited amount of time for juror examination
- Limited amount of pre-trial information
- Time might be better spent learning about the county and its voters

Why Research County?

- In 87 counties jurors are chosen from voter registration lists
- One county uses a combination of registration lists and licensed drivers list
- Jurors will come from the county in which the trial is being held

Do Research on the County

- Know verdict trends in that county
- Find out from lawyers
- Find out from judicial support staff
- Find out from judges
- Know voting history of county
- Know demographics

Demographic Research

- Census Bureau Website: www.census.gov
- Has a tool called: American FactFinder
- Demographic information
- Example of Medina County

Medina County

- 2010 Population: 172,332
- Median Age: 41.4
- Median Income: \$66,952
- Education: 93.5% High School or better
- Racial make-up: 98.9% White
- Poverty rate: 7.4%
- Housing units: 70,239
- Owner occupied: 52,373 or 74.5%

More Medina County

- 26.3% below 19 years of age
- 74% live in “family households”
- Average household size is 3.07
- More women than men in Medina County
- Only 13.7% age 65 or older
- 64.4% employed, 5% unemployed

What Does This Mean?

- Average juror likely to be:
 1. Employed;
 2. Married;
 3. Likely to have children;
 4. Likely to own his/her own house;
 5. Likely to be non-Hispanic white person

Know Your Narrative

- Humans are storytellers
- Have been telling stories ever since we formed societies
- Stories explain things observed
- Stories make sense out of facts

Trials are Stories

- Jury is receiving new information
- Will try to make sense of this new information
- Will be tempted to put this new information into a narrative, a story

Narrative Sources

- Three sources for a narrative:
- You
- Your Opponent
- The jury itself
- Woody Hayes and the forward pass
- Two of those are problematic for you

Elements are not the Story

- Causes of Action have elements
- Trained to think in terms of elements
- Elements are part of the story
- They are not the story
- The story is the human element

Malpractice Verdicts

- Hard to get verdicts for plaintiffs in Medina County in malpractice cases
- Only had two plaintiff verdicts
- One involved a doctor cover up
- Other involved a hospital not following its own rules

Hard for Jury to Understand Medical Negligence

- Have two competing sets of witnesses
- Two competing medical theories
- Being told to a jury of lay persons
- Medical terminology
- Witnesses drawing different conclusions from same set of facts

Easy for Jury to Understand

- Easier to understand a doctor covering up her negligence
- Easier to understand a hospital not following its own rules
- Two simple narratives compared to the more complex one of most medical negligence trials

Why Can Trials Make Good Stories?

- Good stories will involve conflict
- Trials start out with conflict, indeed, trials are conflict
- Good stories are about humans
- Most trials are about humans
- Good stories are familiar
- Trials can involve familiar themes

Trials as Stories-2

- Good stories often have morals
- Trials can have a moral dimension because the human search for justice is a moral search
- Good stories often have resolution
- Trials have resolution in the form of verdicts.

Look for the Human Impact

- How did the breach of contract impact your clients emotionally and financially?
- How did the car accident change your client's life?
- How did the landlord's acts affect your client's family?

Know the Law

- This may seem obvious
- But it is critical
- When you start drafting a pleading make sure you know the elements of the cause of action
- Go to Lexis or Westlaw and find out the elements of each cause of action you are litigating

Should Do In Every Case

- Make sure you review the elements of the cause of action in a civil case or the elements of the crime in a criminal case
- Don't care how many times you have done this sort of case
- Don't care if you are the plaintiff or the defendant

Why So Important?

- Avoid situation where you are dismissed out of court on failure to state a claim
- Begin to build your evidence
- Begin to build your narrative
- Realize what is relevant and not relevant to the case

Know the Law of Damages

- This is an area where lawyers sometimes make mistakes
- While there are general rules that apply to all appellate districts there are other rules of law that are district specific
- One that comes to mind is the law on damages to residential real estate
- Diminution or cost of repair?

Know Affirmative Defenses

- An affirmative defense is one for which the defending party will have the burden or proof
- Also known as “confession and avoidance” defense
- Admits the plaintiff has a claim (the confession) but denies liability (the avoidance)

Incorporate Pleadings into Opening Statement

- In a civil case always make a motion to incorporate your complaint into your opening statement
- This is a discretionary ruling
- Trial judge doesn't have to grant
- Doing this to avoid Civ. R. 50 dismissal after opening statement

Incorporation-2

- Second reason is that you find out where the judge is coming from
- A denial may signal a very technical judge
- Make sure you mention evidence backing up each element if motion is denied

Know the Rules

- Trial lawyers need to know the rules
- Civil Procedure, Criminal Procedure, and Evidence
- Local Rules of Courts in which you practice.
- Need to know these rules
- Most attorneys don't take time to read them from beginning to end.

Internal Logic to the Rules

- There is an internal logic to the rules
- Rules of Civil Procedure
- Rules of Criminal Procedure
- Rules of Evidence
- All have an internal logic

Rules Aren't Taught that Way

- Law professors over intellectualize the law
- This is very true of procedural courses, especially civil procedure
- We are taught law by teachers who don't want to practice
- They will not emphasize the practical.

Learn the Rules

- If you take the time to learn the rules you will be equipped to try cases
- You will be ahead of many of your colleagues who only read the rules when required by problems in a case.

Control Your Client

- Unrealistic expectations ruin relationships
- Whether it is marriage, friendship, or employment, unrealistic expectations can be fatal to the relationship
- Same is true of attorney-client relationships

Make Sure Your Client's Expectations are Realistic

- You need to make sure your client knows what is likely to happen at trial
- Media coverage of trials, especially personal injury trials, helps create unrealistic expectations among clients
- Plaintiff attorneys get caught between client's expectations and juror resentment

Know Verdict Trends

- Make sure you know verdict trends in the county in which your lawsuit is pending
- Talk to other attorneys
- Judges but don't ex parte your opponent
- Court support staff
- Do research on the internet
- Communicate your findings to your clients

Know the Courtroom

- Before you try your case visit the courtroom where the trial will take place
- Make sure you know the technology available in that courtroom
- Make sure you know how to operate any equipment or make sure you bring equipment required to present your case

Not the Job of Court Staff

- To educate you on the use of the court's equipment
- They may help you but you can't count on such help
- Courtrooms across Ohio vary greatly in equipment that is available
- Technology costs money and not all counties have money for equipment

Questions Before Trial

- Does the judge allow jury to ask questions?
- Does the judge allow the jury to take notes?
- Will there be a final pretrial or settlement conference?
- Does the judge want lawyers to submit jury instructions?

Questions-2

- Does the judge allow lawyers to read from instructions during closing argument?
- Will each juror be given a copy of the instructions?
- Will a copy of the instructions be sent back with the jury?

Questions-3

- How does the judge handle jury selection?
- Are you allowed to question the whole panel or just the first eight or 12?
- How are challenges handled?
- Does the judge use a strike method?
- How are alternates handled?

Client Comfort with Courtroom

- Make sure client is comfortable with the courtroom
- Visit courtroom with client
- Introduce to court staff such as bailiff and court reporter
- Explain each person's role to your client
- If possible have them watch parts of a trial

Be Courteous to Judicial Staff

- Judges see support staff everyday
- Tend to be protective of support staff
- Lawyers who are rude to support staff will get talked about
- Lawyers who are courteous to support staff will get talked about

Important Facts about Humans

- People like people who make their jobs easier
- People don't like people who make their jobs harder
- Judicial support staff are people

Jobs Made Harder

- Demanding that your case be moved up without giving a good reason
- Trying to back door the support staff by going directly to the judge
- Not observing the procedure in that courtroom
- Being arrogant and/or rude

Jobs Made Easier

- Understanding their loyalty is to the judge who appoints them
- Understanding that there are others demanding their time/attention
- Understanding the procedures used in that courtroom.

Get Along with the Trial Judge

- In a trial the jury takes its cues from the trial judge
- Judge is not trying to sell them something
- You cannot be seen as fighting with the judge or being discourteous to the judge

Some Don'ts with Judges

- Don't roll your eyes when the judge makes a ruling you don't like
- Don't do an audible sigh that is meant to be heard by the judge
- Don't mutter something under your breath
- Don't act incredulous by using body language

Some More Don'ts with Judges

- Don't threaten to take the ruling to the court of appeals
- Don't argue with opposing counsel in front of the jury or the court
- Don't text on your cell phone while opposing counsel is talking

The Jury is Always Watching

- There are 8-12 people on a jury not counting alternates
- Someone is always going to be watching you and your client
- Not every juror is going to pay attention to the witnesses or counsel's arguments
- Must always make a good appearance

A Story of Jurors' Observing

- Medical malpractice trial
- Two out of town attorneys for the plaintiff
- Jury commented to my bailiff about the "designer" water they drank during trial
- Jury commented about the Mercedes-Benz convertible one of them drove

Keep Credibility with Trial Judge

- Trial judges and umpires both make quick decisions
- Rulings on evidence are usually made quickly
- It is critical that judge respects your abilities

Two Attorneys Example

- Two attorneys are trying a case
- I know that one knows the rules of evidence
- I know that the other does not
- Whose objection will get more consideration?

How do you get respect?

- By knowing the rules
- Both Ohio Rules of Evidence and Ohio Rules of Civil Procedure
- By knowing local rules
- By being on time
- By being professional

Obtaining Respect-2

- By making fewer objections rather than more objections
- By asking for sidebar conferences if you wish to disagree with the judge
- By not peppering a file with motions in limine regarding evidentiary issues
- By not involving the judge in evidentiary disputes during depositions

Avoiding Hearsay Problems

- Hearsay only covers out of court “statements”
- Statements are assertions of fact
- Questions are not hearsay
- BUT the fact that an out of court declarant asked a question must still be relevant

Hearsay-2

- Hearsay can be more than oral communications
- Be aware of signs of possible hearsay when witnesses are asked questions like:
 - “Were you aware?”
 - “Did you learn?”
 - “Did you know?”
 - “Did you become aware?”

Hearsay-3

- When you hear those types of questions you should immediately ask yourself “How did the witness become aware?”
- Non-expert witnesses can only testify from personal knowledge
- Doesn’t include what they are told
- Such questions are often ways of getting hearsay in front of the jury

Hearsay-4

- The proper objection to such questions isn’t, however, “hearsay” but “lack of foundation”
- Make sure that a foundation is laid under Evid. R. 803 (6) for a business record
- On page 93 there are six foundational elements listed for business records
- Lawyers will often skip some of them

Not Federal Rules of Evidence

- Although modeled after the Federal Rules of Evidence, Ohio’s rules are not identical
- Federal philosophy: “All hearsay is good except for bad hearsay”
- Ohio philosophy: “All hearsay is bad except for good hearsay”

Incorporate Visual Media

- We live in a media saturated society
- This is especially true of visual media
- Think of all the way consumers get visual media
- TV, movies, websites, social media
- So they are used to receiving information visually

Visual Media-2

- Look for ways to use visual media in your trials
- When possible use pictures
- “Pictures are worth a thousand words” is still true
- Look for ways to use visual media

Visual Media-3

- Visual media can be used during trial even if not offered as an exhibit
- This is done to help explain the witness’s testimony
- Think of medical illustrations of a surgical procedure

Visual Media-4

- If going to do this, explain to opposing counsel and judge what you are doing before using such an illustration
- Consider using Power Point during opening statements and closing arguments
- If doing so, make sure judge and opposing party know beforehand

Final Thoughts

- Take pride in being a trial lawyer
- Take pride in helping courts do justice
- Take pride in your role in the process
- Not going to win them all, but all of them deserve your commitment and hard work
