5 Things

We all know it's true:

Judges do things that bug lawyers.

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So we asked a brave lawyer and a couple of judges (a father and daughter) to offer

five dos and don'ts

for making the day-to-day business of the law a little more efficient – and maybe just a little more **pleasant** for us all.

FIVE DOS AND DON'TS FOR LAYWERS *by* JUDGES ASHLEY MOODY AND JAMES S. MOODY JR.

lawyers *should* . . .

1. When making an objection, state only its legal grounds unless the court invites additional argument. Upon making an objection, lawyers often launch directly into a supporting argument. If it is a jury trial, the jury is not supposed to hear legal arguments. If it is a bench trial, the court usually understands the objection without the necessity of an argument. A lawyer should say "Objection," and then state only the legal grounds (such as "Objection, hearsay" or "Objection, relevance") and WAIT FOR GUIDANCE FROM THE COURT.

A lawyer may be concerned that the court will rule before fully understanding the basis of the objection. If the court rules without hearing argument, and counsel thinks the court did not understand the basis of the objection, counsel may then ask to approach the bench or, in a bench trial, for permission to make a brief argument in support.

2. During trial, stand behind the lectern when addressing the court, the jury, and witnesses. Lawyers frequently, without permission, wander about the courtroom during trial when addressing the court, the jury, or a witness. Most courts prefer that a lawyer remain behind the lectern* when performing these functions. DO NOT SLOUCH OR LEAN ON THE LECTERN. DO NOT SIT ON COUNSEL TABLE.

Apparently some trial seminar has suggested that it is more effective to get close to the jury or to demonstrate how relaxed one is in the courtroom by moving around in the well of the court. Different judges have different preferences. Most prefer lawyers remain behind the lectern. Prior to moving around the courtroom, seek the trial judge's permission.

**A lectern is a stand, usually with a slanted top, upon which a speaker may place notes or books. It is not a "podium." A podium is a raised platform.*

3. Do more listening. Lawyers are advocates, but effective advocacy is not just making an argument. It is listening to the question a judge asks and answering it directly. It is letting the witness finish an answer without interrupting. It is even listening to opposing counsel, without interruption, and then addressing the issues in dispute, not those conceded.

4. Pay earlier attention to exhibits. JURORS AND JUDGES ALIKE APPRECIATE A QUICK, ORDERLY TRIAL. It wastes time to mark an exhibit during trial, have it identified by a witness, lay a foundation, and then move it into evidence. A lawyer appears more in control when he or she is able to discuss the documents without first going through this tedious process as if there may be some doubt as to admissibility. To do this, give early attention to the exhibits.

Exhibits should be premarked and their admissibility discussed with opposing counsel before pretrial. For exhibits not stipulated as admissible, request a hearing to have the court determine admissibility before the trial begins. Counsel may also agree whether exhibits may be used during opening statements.

5. Provide case law to the court at least three days in advance. While we judges take as a compliment that lawyers think we can absorb case law through osmosis during a hearing, it is more appreciated if we have it in advance so that we can read it and then pretend we knew the law all along.

Three days is generally enough time for the court to review cases before a hearing. It helps, and is recommended, that the cases be highlighted for the salient point each item supports. Of course, give opposing counsel (with the same advance notice given to the court) copies of the cases highlighted in the same manner.

FIVE DOS AND DON'TS FOR JUDGES *by* ATTORNEY STEPHEN D. SUSMAN

judges *should* . . .

1. At the first scheduling conference, tell the lawyers how much time will be allowed for the trial and how that time will be divided among the parties. The most frequently heard objection to public dispute resolution, whether by judge or jury, is expense. EXPENSE IS MAINLY A FUNCTION OF THE TIME ALLOWED FOR DISCOVERY AND TRIAL. Even though it may seem arbitrary, experienced judges can set fair time limits once they know the nature of the dispute. Limiting the length of trials allows the lawyers to plan discovery proportional to the amount of time allotted for trial. It makes no sense to take dozens of depositions when the court has given each side 10 hours of trial time! A shorter trial also means a jury that is better educated and more highly employed. Jury consultants have created an industry on the premise that a day's mock trial is highly predictive of a month-long trial. The biggest complaint of jurors is repetition by the lawyers. Lawyers who have tried cases where there are strict time limits invariably report that these trials are better.

2. At the first conference, set a definite, non-movable trial date or a firm deadline for completion of discovery. It's obviously best for the court to set a firm and early trial date, but because criminal cases take precedence and because judges have to schedule multiple civil cases at the same time in order to assure there is something to try, setting a firm trial date is often impossible. Instead judges should set a fixed and short discovery period that starts when the lawyers agree it should start but that ends a fixed number of months thereafter, regardless of when it starts and regardless of when the trial is or can be set. The expense of discovery is directly correlated to the amount of time allowed for discovery.

3. Give jurors the same tools judges use in bench trials to decide fact issues. Judges can ask questions of witnesses, keep notes, get real-time transcripts, read entire exhibits, discuss the case with their law clerks, and know what the law is before they hear the evidence. IT IS RIDICULOUS THAT THE SAME TOOLS ARE ROUTINELY DENIED TO JURORS. In civil cases, without any rule changes, judges have the ability to allow jurors to ask questions of witnesses, to take notes, to discuss the evidence with other jurors before final deliberations, to be given individual copies of written instructions on the law before the trial begins, and to hear interim arguments of counsel. None of these changes would slow down the trial and all would improve juror comprehension.

4. Require the lawyers to bring their clients to the first conference and then meet and confer at the courthouse as to which of the pretrial and trial agreements found at TrialByAgreement.com they cannot agree to and explain to the court why not. It is important that counsel be required to consider various ways of reducing the expense of discovery (such as eliminating expert depositions, allowing the preemptory challenge of a small number of documents on each side's privilege list) and streamlining the trial, even if the parties ultimately decide not to adopt a certain procedure. If the lawyers have to involve their clients in these discussions and then explain to the court why the clients have elected not to use these cost-saving devices, there may be agreement on more things.

5. Establish a rule that encourages parties to assign to young lawyers stand-up roles in court. A number of courts are adopting a rule that encourages the parties to ALLOW YOUNG LAWYERS TO ARGUE MOTIONS AND TO PARTICIPATE ACTIVELY IN THE TRIAL. In one variation, the court promises an oral argument to parties who elect to assign the task to young associates.

lawyers *should* NOT. . .

1. Speak directly to opposing counsel during proceedings. All remarks should be addressed to the judge, jury, or witness. These are the persons to be persuaded, not opposing counsel. Remarks made directly to opposing counsel merely invite bickering.

If it is necessary to speak with opposing counsel during proceedings, ask the court for a moment to have a conversation off the record.

2. Make negative comments or facial expressions. Do not physically react to court rulings or witness testimony. Attorneys must be careful of not only their facial expressions, but those of their clients and office personnel who may be sitting in the courtroom. Jurors are alert to reactions of lawyers and parties, particularly when harmful testimony is coming from the witness stand. IT IS HIGHLY UNPROFESSIONAL TO CONVEY A MESSAGE THROUGH FACIAL EXPRESSIONS, muttering under one's breath, or sighing.

3. List all of opposing counsel's prior bad acts. At a hearing, a judge is listening for arguments about the legal issue at hand. Airing frustrations does not advance the merits of an argument.*

Prior bad acts may be listed for the court when relevant, such as in a discovery dispute to show the efforts made to avoid having to come to the hearing. BUT OPPOSING COUNSEL'S BAD ACTS ARE NOT RELEVANT TO YOUR OWN. They should not be listed as a defense for one's own failure to provide discovery.

**Consideration should be given to reporting unprofessional lawyers to professionalism panels when appropriate.*

4. Be verbose or argumentative. Arguments must stop at some point so that the court can rule. This requires you to do two things: (1) be concise in making an argument, and (2) once each side has made argument, stop. DO NOT KEEP ARGUING BACK AND FORTH. If additional argument is needed before the court rules, ask permission. After the court has ruled on your motion or objection, do not continue to make argument unless permitted by the court.

5. Send uninformed lawyers to handle matters on your behalf. Lawyers are busy. So are judges. A busy lawyer often sends an uninformed associate to handle an argument. That is of little assistance to the court in making the proper ruling. IF THE MOTION IS WORTH FILING, IT SHOULD BE WORTH THE ATTENDANCE OF ONE KNOWLEDGEABLE ABOUT THE ISSUE. If an informed lawyer is unavailable, ask to continue the hearing or to be accommodated by telephone.

ABOUT THE JUDGES

ASHLEY MOODY is a State Circuit Judge for the 13th Judicial Circuit of Florida (Tampa). Her father, **JAMES S. MOODY, JR.**, is a U.S. District Judge for the Middle District of Florida (Tampa Division). Their "dos and don'ts" are based on the results of surveys of trial judges, both federal and state, on the things they would like to see lawyers change, or do better, in their courtrooms. The surveys were conducted for a presentation to the American Board of Trial Advocates (ABOTA) in 2015. The Moodys say that while respondents differed in their individual rankings of the issues, the suggestions listed here were consistently near the top.

judges *should* NOT. . .

1. Allow PowerPoint slide decks to be given to the court as supplemental briefing. Courts have generally adopted rules limiting the length of briefs and the rounds of briefs that can be filed (e.g., motions, responses, replies). Yet lawyers show up for oral arguments with huge slide decks that resemble additional briefs and frequently only show a few slides to the court. It's fine for the court to request a written copy of slides actually shown during argument, but it's unfair for the court to accept the entire slide deck at the end of the argument. DOING THAT ALLOWS COUNSEL TO EVADE THE PAGE LIMITATIONS ON BRIEFS.

2. Allow motions in limine to be used as second bites at summary judgment or *Daubert* motions. A motion in limine should only be filed in jury trials and only for the purpose of preventing any mention of highly prejudicial statements in openings or closing or questions that, once heard by the jury, cannot easily be cured by an instruction to disregard. Yet a lot of judges are allowing such motions to be similar to motions for summary judgment or *Daubert* motions or for advisory opinions on the admissibility of evidence. The court should make it clear that this will not be tolerated.

3. Require pretrial designation of deposition testimony. One of the biggest expenses of trials is the preparation of exhaustive pretrial orders. In going overboard to prevent any surprises, courts have increased the cost of all trials. Some have advocated that the pretrial order be dispensed with entirely, except for a live witness list and an exhibit list. At the very least, THERE SHOULD BE NO REQUIREMENT FOR DESIGNATING PAGES AND LINES OF DEPOSITION TESTIMONY UNTIL 48 HOURS BEFORE THEY ARE TO BE READ TO THE JURY. In 90 percent of the cases, 90 percent of the testimony designated, counter-designated and objected to in advance never is played to the jury.

4. Keep jurors waiting, either in the box or the jury room. Many courts prohibit sidebars and refuse to excuse the jury while the lawyers remain behind to argue points of law. Jurors hate this waste of their time. They expect lawyers to object and the courts to be quick on their rulings. MAKING LAWYERS ARGUE OBJECTIONS IN THE PRESENCE OF THE JURY IS BOUND TO DISCOURAGE FRIVOLOUS OBJECTIONS.

5. Require the filing of any papers before a discovery dispute can be put before the court during a short telephone call. JUDGES SHOULD BE WILLING TO ENTERTAIN SHORT CONFERENCE CALLS FROM LAWYERS TO RESOLVE DISCOVERY DISPUTES. Each side should be given five minutes to state its position. They should then rule before the call ends. If the court needs anything reduced to paper, she can specify the issue and the format (letter or brief). I suspect that 80 percent of the time, the judge is very capable of shooting from the hip and making a ruling that has no chance of determining the outcome.

ABOUT THE LAWYER

STEPHEN D. SUSMAN is a partner with Susman Godfrey LLP in Texas. A well-known and highly successful plaintiff's attorney, Susman bases his suggestions for judges on more than 50 years of experience in the courtroom. A board-certified civil trial specialist, Susman serves on the national board of the American Board of Trial Advocates, the Advisory Board of the Center of Civil Justice at NYU Law School, the Federal Judicial Evaluation Committee, and as co-chair of the Judicial Nominations Task Force of the American Constitution Society.