WHAT YOU SHOULD KNOW ABOUT A JURY TRIAL

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The vast majority of lawsuits that are filed never go to trial. Settlements, changes of heart, and changes in circumstances of one or more of the litigants will operate to cause most litigation to be dismissed before a trial is ever had.

As to those cases that do go as far as a jury trial, the average litigant will have had no prior experience with such a legal adventure, such that an explanation of exactly what happens when a case goes that far will invariably help that person better understand the process and what their role in it will be.
As being forewarned is being forearmed, the following is provided:

I.

PROCEDURE

A. Assignment:

Cases are not necessarily assigned for trial to the same department where the trial is originally set for. Other cases may already be assigned to that department, and you may have to wait until they are concluded or the case is assigned to another available department. This may take several hours or several days, or the trial date may be continued for a matter of weeks or even months. Being assigned a trial date is not like getting a reservation in a restaurant.

B. Motions in Limine: Both sides will normally present Motions in Limine (MIL) to the judge before a jury pool is summoned, in order to limit or prevent certain types of evidence that the opposing side may try to present before the jury and which might influence or prejudice their perception of the evidence and thereby effect the outcome of the trial.

MILs are always based on one or more of three different grounds: (1) the evidence sought to be excluded is not legally relevant, as it does not pertain to an issue in the case; (2) whether or not the evidence is relevant, hearing such evidence will result in the undue consumption of valuable trial time; and/or (3) whether or not the evidence is relevant, hearing such evidence will unduly prejudice the party seeking to exclude it, because it is confusing, misleading or inflammatory [Evidence Code section 352].

Typical MILs by a plaintiff in a personal injury case might include the following:

MIL to exclude evidence that the plaintiff had medical insurance: The fact that a plaintiff has medical or disability insurance available to defray their losses is not legally relevant, and the *Collateral Source Rule* holds that a plaintiff's foresight or providence in having insurance to cover their losses does not inure to the benefit of the defendant who caused the loss to begin with. As a practical matter, many health insurance policies require reimbursement if the plaintiff is successful in their personal injury case. This type of MIL is standard in a personal injury case and is invariably granted by the court.

MIL to exclude reference to fact that the plaintiff had prior legal claims: Some plaintiffs may have been involved in prior legal claims or lawsuits, which may or may not be similar to the one that is now proceeding to trial. As some jurors may look askance at this fact, and as the fact of prior legal claims or lawsuits is legally not relevant to the case now going to trial, a MIL to exclude such a fact will usually be made by the plaintiff, and will usually be granted.

If it is a personal injury claim, the fact that the plaintiff suffered prior injuries, at least if they are similar to those being claimed in the current case, would probably still be admissible as evidence, only without reference before the jury of the accompanying prior claim or lawsuit, if one was involved.

MIL to limit the scope of the defendant's expert witness testimony: Especially in personal injury litigation, both parties will usually present expert witness testimony, be it from a medical doctor, chiropractor, accident reconstruction engineer, bio-mechanical engineer, safety engineer, or any other number of experts whose testimony would be relevant to the issues that are unique to that case.

Many experts will want to present opinions that go beyond the scope of their claimed expertise, in which case a MIL will be called for. For example, an orthopedic surgeon may want to opine on whether chiropractic care was called for, even though he or she has no training or experience in chiropractic treatment. A bio-mechanical engineer might want to give an opinion on whether or not a plaintiff was injured in an accident, even though he or she has no medical training or experience.

A judicious use of an appropriately directed MIL can prevent such defense experts from passing themselves off as a jack of all trades, when in fact they are a master of only one.

Typical MILs by a defendant in a personal injury case might include the following:

MIL to exclude evidence that the defendant had liability insurance: Whether or not a defendant had liability insurance is not relevant to whether or not they were negligent in the causation of the accident, and may unfairly prejudice the defendant in the eyes of the jury. A defendant will invariably bring such a MIL and it will invariably be granted by the court.

MIL to exclude evidence that the defendant had a misdemeanor conviction or traffic infractions on their driving record: The defendant is on trial for what he or she did or didn't do in the accident that is the subject of the lawsuit, and not what he or she may have done in the past. If in fact the defendant has a bad traffic record, their attorney will almost always bring a MIL on this point, and it will usually be granted by the court.

MIL to exclude evidence that defendant was intoxicated at time of accident: If a defendant's consumption of intoxicants was involved in causing an accident, a shrewd defense attorney will stipulate to their client's liability, and then bring a MIL in exclude evidence of the defendant's intoxication, on the grounds that it is now no longer legally relevant and that its prejudicial effect if heard by the jury would outweigh whatever relevance it might have.

These types of motions are often granted by the court, which is interested in reducing the amount of time that the case will actually be in trial, and who will want both sides to have a fair and unbiased trial. However, under the law, an intoxicated driver may be held responsible for punitive damages if they cause injury to a plaintiff, such that if the defendant is found liable and damages are awarded, a second phase of the jury trial may commence thereafter, so that the jury can hear evidence of the defendant's intoxication and determine whether it constitutes a form of malice that would justify an award of punitive damages to punish the defendant and/or make an example of them.

The type of case and the imagination of the attorneys will determine what type of MILs may be filed in any given matter.

C. Voir Dire: This is the first part of a jury trial that directly involves the jurors. A pool of prospective jurors will be assigned to the trial department, and the trial judge will initially question them on certain basic questions like name, employment, marital status, past jury experience, and whether it would be a hardship for them to serve on the jury. The lawyers for the respective parties will also be given an opportunity to question the panel as well thereafter, to ascertain if any of the prospective jurors may be

biased against their clients because of the facts of the case. If bias is demonstrated, a potential juror may be challenged for cause, although challenges for actual bias are rarely granted. If no actual bias can be demonstrated, then any prospective jury may be excused without cause, but this may only be done a limited number of times (usually 6). When the lawyers no longer excuse any more potential jurors, then a 12 member panel will be sworn in, and possibly some alternate jurors as well.

Attorneys in a personal injury case will normally want to question the panel about their own experiences in being either a plaintiff or a defendant in prior legal actions, whether they or anybody close to them ever experienced a similar injury to that being claimed by the plaintiff, whether they have any medical or legal training or background, their thoughts or opinions on how the civil justice system works, and whether or not they have been involved in similar accidents.

Voir dire is not supposed to indoctrinate a potential juror to any attorney's perspective on the case, but obviously each attorney will be looking for a mind set on the part of that potential juror which is most likely to benefit his client.

In high profile criminal defense or catastrophic injury cases, some attorneys will hire professional jury consultants, who bring principles of psychology, sociology, and body language to the analysis of prospective jurors.

Jury analysis over the years has indicated that a person's political affiliations, occupation, race, and socio-economic status may have a lot to do with how they might vote in deliberations.

The bottom-line experience of this law firm is that you never really know what any given juror is going to do until the verdict comes back. The best that you can do for your client before that event is to weed out the obvious misfits or bad apples, and then go with your best instinct as to who you will agree to.

D. Opening Statement: This is the next stage, where the lawyers, starting with the plaintiff's counsel, will alternately make a statement to the jury explaining what the evidence will show and what the issues are. It is not an opportunity to present argument, but to set forth what issues are involved in the case, and what evidence they are likely to hear that will have a bearing on those issues.

E. Presentation of Evidence: This will consist of oral testimony by witnesses and the introduction of documentary or demonstrative evidence.

The plaintiff presents their witnesses first, and the defense attorneys then have an opportunity to cross-examine the plaintiff's witnesses. Documentary or demonstrative evidence, unless stipulated to in advance by counsel, will have to have a foundation laid for its authenticity and reliability by a witness on the stand before the documents can be introduced into evidence.

When the plaintiff is done presenting their case, the plaintiff will "rest" and it will then be the defendant's opportunity to present their evidence. Of course, the defense witnesses are subject to cross-examination by the plaintiff's attorney as well.

After the defendant rests, the plaintiff may present rebuttal evidence, although they are not required to.

Both attorneys may object to any question presented to a witness or to a document sought to be admitted into evidence, and the judge will then rule on the objections. Sometimes the court will entertain argument by counsel on the merits or substance of any given objection, outside of the presence of the jury.

Attorneys may sometimes also move to strike the testimony of certain witnesses, if it is non-responsive to their question or it touches on matters that are not admissible at trial given the rules of evidence. While the jury will be instructed to disregard evidence that is stricken, as a practical matter it is probably difficult for a lay person to do this, after the bell has been rung.

F. Closing Argument: After both sides have rested, the attorneys will alternate in arguing to the jury what they believe the evidence has proven, and what the amount of the damages are.

Again, the plaintiff's attorney will always proceed first, and following the defendant's attorney's argument the plaintiff's attorney may present rebuttal argument, thereby providing the plaintiff the "last word". This is because the plaintiff has the burden of proof, as a matter of legal procedure.

While the jury will be instructed that attorney argument is not evidence, and that they shouldn't make up their minds on the case until after they deliberate, some studies suggest that many jurors make up their minds immediately after hearing the opening statements, which may make that event the most critical in the course of the trial.

G. Jury Instructions: All attorneys will submit proposed jury instructions on the law that support their theory of the case. The Judge will decide what instructions will actually be read to the jury, and he or she will then instruct the jury, usually at the conclusion of closing argument.

Most jury instructions are "form" instructions, that are in pre-printed form and have been approved by the Judicial Council of the State of California. While they are intended to be easy to understand for the lay person, if for no other reason than the sheer number of instructions that are customarily read to a jury, many jurors may respond to the instructions with a mixture of indifference or confusion, in the experience of this law firm.

The jury instructions are also customarily presented to the jury in written form to take with them into deliberations.

During closing argument, the attorneys may emphasize certain of the instructions to the jury as being more important than others.

H. Jury Deliberations: The jury will then retire and decide the case in private. Their first task is to elect a foreperson, who will preside over the deliberations. In the experience of this law firm, the foreperson will usually be somebody who is assertive and who is in a position of supervision or major decision-making in their private life or employment.

Deliberations may take hours, or even days to do, depending upon the nature of the case, the length of the trial, and the attitude and disposition of the jury. Jurors may request certain testimony to be read back to them fromthe court reporter, if a court reporter reported the proceedings. Jurors, through the foreperson, may also present written questions to the court for guidance, regarding issues that arise during deliberations. The court will then discuss this with counsel outside of the jury, and attempt to craft a written response to their questions with the approval of both counsel.

The jury will be supplied with a verdict form, usually called a special verdict, wherein they will have to agree by a vote of 9 out of 12 in a civil case as to the questions presented to them. In a criminal case, a unanimous verdict is required.

Typical questions in a personal injury case would be: (1) Was the defendant negligent? (2) If the defendant was negligent, was it a cause of injury to the plaintiff? (3) What are the amount of damages due the plaintiff, if any?

As a general rule, the longer the jury is out, the better it probably is for the plaintiff, as it takes time to deliberate on damages with any degree of a majority vote, once negligence has been voted on.

If 9 out of 12 jurors in a civil case or 12 out of 12 jurors in a criminal case cannot agree on all of the questions presented to them in the special verdict, then the court could declare a mis-trial, which operates to cancel the proceedings and would require another jury trial. This rarely happens, however.

In a civil case, a mis-trial is usually regarded as somewhat disastrous by both sides, as it will require further legal proceedings. In a criminal case, however, a mis-trial is usually regarded as a victory by the defendant, as the district attorney may think twice about re-trying the case if they couldn't get a unanimous

verdict the first time. This may result in a dismissal of the charges, or a more favorable plea bargain being extended to the defendant.

I. Post-Trial Proceedings: Depending upon which side prevails, and how the trial progressed, either side may file post-trial motions to reduce the verdict amount (if in favor of the plaintiff, and called remittitur), to increase the amount of the verdict (if the jury found for the plaintiff but awarded inadequate damages, and called additur), to have the judge make a judgment opposite to what the jury concluded (called a judgment notwithstanding the verdict, and which thereby eliminates the jury's verdict), or to have a new trial. Specific legal criteria apply to each of these motions, as they must be based upon something other than sour grapes or wishful thinking.

An appeal may also be filed which will allege that an error was made at trial, such that a new trial or a different result should be had.

The plaintiff in a personal injury case should be forewarned that a favorable plaintiff's verdict for a significant amount of damages will nearly always generate post-trial proceedings by the defense, if for no other reason than to gain leverage in any post-verdict discussions that may had in regard to settlement.

II.

THE ROLE OF THE JUDGE

A. The judge is the referee in a trial. He or she decides issues of law, which would include ruling on any MIL and trial objections, admitting or denying exhibits into evidence, determining courtroom procedure, and instructing the jury on the law.

III.

THE ROLE OF THE JURY

A. The jury decides issues of fact, which would include evaluating the credibility of witnesses, determining if the plaintiff has proven their case, and determining the amount of damages to be awarded if the plaintiff prevails on liability.

IV.

REMEMBER THE FOLLOWING:

A. Respect the Judge: If you are a party in the lawsuit and the Judge asks you a question, one should always address the Judge as "Your Honor", regardless of the sex of the Judge. Avoid saying "sir" or "madam".

B. Avoiding Juror Contact: During breaks in the proceedings (there will typically be 90 minutes for lunch at noon, and a 10-15 minute break every mid-morning and mid-afternoon), a party may encounter jurors in the hallway, cafeteria, or restroom. A party should NEVER allow themself to be engaged in conversation with a juror. The most innocent remark, like saying "good morning" or asking for the time of day, can be misconstrued by other people who may be observing. In doing so, a party risks embarrassing themself and their attorney; and they may even risk the Judge declaring a mistrial, which means the case will have to start all anew, with additional expense. **Don't do it**.

C. Party Presentation During Trial: The parties to the case will customarily be seated at the counsel table next to their attorney throughout the trial. A party should NEVER forget that the jury will be looking them over very carefully throughout the course of the trial With this in mind, be aware of the following considerations regarding trial presentation if you are a party:

1) Dress conservatively. Avoid excessive jewelry, and dress like you would if you had to go to church, even if you are not a church-goer.

2) Never make faces, rolling of the eyes, gestures or unsolicited comments if you disagree with a witness's testimony when they are on the stand. Let your attorney cross-examine them and use closing argument to get at the truth. Don't be surprised to hear people lie under oath or to have a different version or recollection of the facts than what you may otherwise recall.

3) Never display anger, resentment, impatience, or animosity toward the other party or their attorney, especially when being cross-examined. Jurors react favorably to people who are likeable, and not favorably to people who appear to have an attitude, are argumentative, or who are being evasive.

4) Read your deposition testimony, any past statements, your medical records, and your answers to interrogatories carefully several times before and during the course of the trial. If your trial testimony differs significantly from those documents, then the opposing party's attorneys will seize that opportunity to attack your credibility or recollection by referring to your prior inconsistent statements in such materials in the presence of the jury (this is called "impeachment"). This is NOT a job that your attorney can do for you. It is your homework assignment to make the best case as possible for yourself.

SEE YOU IN COURT!