TIPS FROM THE BENCH
by Judge R .P. Jones

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Pretrial planning

A pretrial activity outline for every trial is a must. With the benefit of this outline/checklist, you minimize the danger of overlooking a critical pretrial activity. The closer you get to your trial date, the more hectic trial preparation seems to be. The activity outline is a real comfort blanket that keeps you on schedule.

The illustration that follows is only a skeleton. Your outline will likely be more comprehensive. Good! I've selected a starting date four weeks prior to the trial date. You may wish to start your plan at an earlier date –fine, the earlier the better.

Illustration of a pretrial outline/checklist

Your trial date is four weeks away. Pleadings are at issue, discovery complete. For the next four weeks, prepare a detailed outline of the specific tasks that need to be completed during each week.

Four weeks before trial

- Review your pleadings – re-evaluate specific allegations, tort or contract, particularly damages.
- If necessary, file amended or supplemental pleadings *now*. First request a stipulation to do so. If not forthcoming, file a motion to amend.
- Serve trial subpoenas, but first alert witnesses.
- Review discovery, requests for admissions. Neglected anything? Has opponent complied?
- If necessary, draft a motion in limine.
- Prepare "proof" checklist. Specify each factual item you will be required to prove. Use your pleadings as a checklist.
- Provide client with status report.
- Explore settlement possibilities – request settlement conference

Three weeks before trial

- Organize your trial notebook.
- Outline depositions.
- Draft jury instructions.
- Prepare draft exhibit list.
- Check service of subpoenas.
- Identify stipulations you will need.

Two weeks before trial

- Prepare profile of jury. List the *good* characteristics that you would hope to see in a juror and the *bad* characteristics of jurors you want to avoid.

- Prepare your jury selection questions.
- Pencil in your trial witness schedule
- Reconfirm witness availability.
- Prepare and instruct witnesses/client.
- Exchange stipulations.
- Prepare direct examination questions.
- Discuss settlement position with client.
- Rethink your proof checklist.

One week before trial

Finalize:

jury instructions
trial memo
motion in limine
trial notebook

- Review testimony with client and witnesses
- Review exhibit list.
- Outline cross-examination.
- Sketch closing argument.
- Arrange audio-visual equipment if necessary.
- Finalize demonstrative exhibits.
- Check final availability with witnesses.
- Rehearse opening statement.
- Edit videotapes.
- Prepare your order of proof.

The trial notebook

A trial notebook is a major helpmate to the litigator. Once you have used this technique, you'll never try a case without one. It is not a substitute for your standard office file. My recommendation is a simple three ring binder. It should have at least a three-inch width capacity. Select the type where the rings snap open quietly. Otherwise, the noise in the courtroom can be irritating. Start your trial notebook at least three weeks before trial.

Use many separators – with big tabs that can be read easily. The traditional lawyer's legal tablet can be purchased three-hole punched. This enables you to sort and file your trial notes in your trial binder. Colored paper can be helpful. Post-it notes are great for temporary page markers. Keep several colors handy to prompt your memory. Assorted colored highlight pens are the best bet for marking notes to remind you of significant items of testimony.

Contents:

What should the trial notebook contain? Everything that you will need at any court appearance or at a deposition.

Pleadings:

The first section of the trial notebook should contain your current pleadings, complaint, and answer. These should be work copies to mark and highlight at will.

Trial notes page captions:

For each half day of trial, write a caption across the top of the legal tablet page. A hand-written page caption for each half day as demonstrated in the following example is most helpful for locating events and witnesses quickly. Using half days rather than full days with page captions coupled with generous spacing gives you the capability to insert notes – prompters, etc.

Documents to lodge with trial judge before trial

- Trial memo.
- Jury instructions.
- Verdict.
- Motion in limine.

Check local SLR's on time requirement. Multnomah County requires that those documents be lodged with the trial department by noon on the day before trial (SLR 6.015(4)).

Regardless of any rule, trial judges appreciate having this material at least the day before trial begins.

The trial memorandum

A trial memo should not be a ponderous, lifeless tome with lengthy quotations and string citations – a word processor run amok. At trial memo is not an appellate brief nor a written closing argument! The single purpose of a trial memo is to inform the trial judge about the nature of the case; the factual and legal issues.

Avoid pretentious rhetoric. Never assail your opponent on a personal basis. Be concise, professional; write in plainspeak. To help the trial judge locate topics quickly, make your paragraphs short with descriptive/graphic captions.

Some lawyers have a perception that there is a correlation between *length* and *strength* of a trial memorandum. Absolutely false. The same attention span parameter that governs the listener's ability to concentrate on what is being said equally applies to the reader of the written word.

Editing and proofreading:

Inbred in the legal profession is the belief that legal writings should be sterile and the methodology technical. Nonsense. Craft your memo so that it is both interesting and persuasive. Most word processing programs include a spelling checker, a grammar review, and a thesaurus – use them. Resist the temptation to list multiple citations. Make it your trademark to submit only those citations which are on all-fours. Honor your ethical responsibility to bring adverse law to the attention of the court.

Include the page numbers of your reference in your cite; for example, Black v. White, 270 Or 123, 146. This will enable the judge to go directly to the root of your authority. Beware of transpositions in your cites – a common error when working with numbers. Transpositions are difficult to detect by simply proofreading.

Electronic assistance:

Knowing that your cite has not been overruled, modified or criticized is crucial. Typos in the case name or transpositions in the volume and page number in citations are vexing and time-consuming. Solution: proof your cites electronically – a fail-safe and lightning fast method. One such service is offered by *Westlaw*, called *Westcheck Automated Citation Checking*. It will verify citations in your trial memo (any legal document or manually entered citation) and:

- Shepardize every case you've cited.
- Correct any error in your cite numbers, transpositions or otherwise.
- Correct any misspelling or incorrect names in the case title of your cite.

Westcheck's review will be current within 24 hours!

If you are citing an especially significant point from an appellate case, textbook, encyclopedia, etc, photocopy that page (only the cited page is necessary), then highlight the specific words. Keep in mind that judges do not have the Pacific reporter in their chambers so you must use the Oregon citation system.

When you cite a case to a judge, you are giving your personal pledge, as an officer of the court, that the case you cite is relevant, on point, that it has been Shepardized and is currently good law. Never cite a case that you have not read. Don't adopt cites that you come across in your research unless you have verified their accuracy.

As a litigator, you may delegate the research and drafting of your trial memo to a colleague, but you cannot delegate your personal professional responsibility for every word contained in the trial memorandum.

A suggested framework for the typical trial memorandum:

Plaintiff's Trial Memorandum

Nature of the case

Plaintiff seeks compensation for personal injuries he sustained while in the course of his employment. The defendant is a contractor whose employees were working on the same job site at the same time as plaintiff. Plaintiff's complaint sets forth two theories of recovery, one for common law negligence, the other based on Employer's Liability.

Factual Issues

The pivotal question will be: whose employee, plaintiffs' or defendants', removed the guard rails from the scaffolding. Plaintiff contends that the guard rails were removed by defendant's employees. The defendant contends that plaintiffs employer's employees removed the guard rails.

Legal Issues

1. Are violations of the safety code as alleged in plaintiffs complaint negligence per se as to both the common law and Employers Liablility claims?
2. Is evidence that a settlement covenant was entered into with a former party admissible?
3. Is the oral statement of an unidentified employee made at the moment of the accident admissible?
4. Can plaintiff be held guilty of contributory negligence based on alleged violations of safety codes?

Legal Arguments

As to issue #1, plaintiff contends…
(Followed by citations)

As to issue #2, plaintiff contends…

As to issue #3, plaintiff contends…

As to issue #4, plaintiff contends…

Evidentiary Issues

1. Plaintiff plans to offer a videotape demonstration of how this accident occurred.
2. Plaintiff requests a jury view of the work site. Defendant has indicated an objection based on change of conditions.

Damages

Claims for economic damage will include:

- Past and future medical care,
- Lost wages, and
- Past and future impairment of earning ability.

Claims for non-economic damage will include:

- Past and future pain and suffering,
- Permanent disability,
- Aggravation of a pre-existing condition, and
- Plaintiff also contends that because of a pre-existing condition, he was more susceptible to injury.

Summary

It is the plaintiffs position that the evidence will demonstrate that the guard rails were removed by defendant's employees, and that such removal was a violation of the safety code; therefore, defendant is negligent as a matter of law.

Opening Statement

Opening statement:

Based on jury surveys, the conclusion is unmistakable that your opening statement will be a crucial part of a trial. "Primacy," the first impression concept, may be the reason. Whatever the explanation, recognize the need to prepare your opening with meticulous care.

- Use notes or an outline. However, never read your opening.
- Avoid argument in your opening – it is improper and you risk an admonition from the court.
- Personalize your client – background-education-family-work history.
- Disclose any unfavorable aspect of your case. Let the jurors hear the bad news first from you. Don't give your opponent the opportunity to suggest to the jury that you held back certain information.
- Don't overstate, or make claims that you cannot prove. Your opponent will pointedly remind the jury in closing as to each of your unproved assertions.
- Use visual aids and exhibits.
- Be comprehensive. Rarely, if ever, withhold something for perceived tactical reasons.
- Maintain eye contact with the jurors as you talk.
- Your first words must be attention-grabbers and your final words compelling and long remembered.
- Be specific but don't permit details to become tedious.
- Rehearse – rehearse – rehearse.

Objections during opening statements:

Try to avoid making objections to your opponent's opening. It creates a poor impression on a jury. They consider it rude. Common ground for an objection is that the opening is argumentative. Before jumping to your feet, ask yourself, "Will this objection be productive?"

Objections

Why object:

The most striking dissimilarity between the experienced litigator and the novice is his or her attitude toward objections. The seasoned attorney objects infrequently, the novice constantly.

Never object merely because of an evidentiary imperfection or a procedural error. *Only object when a favorable ruling on your objection will aid your client's case.* Admittedly, it is difficult to discipline yourself not to jump up and object when you observe a technical violation of the rules of evidence. But keep in mind that you are not in the courtroom to police the rules of evidence!

Example:

Question: "State the name of the person you saw at the scene."

Opponent: "Objection. The question assumes that the witness knows that person's name."

In law school we were taught that the function of an objection was to exclude inadmissible evidence. As litigators, we learned to object only when the evidence is both inadmissible and harmful.

All jury surveys contain one consistent finding – jurors do not like objections! They resent your attempt to keep something from them. You also run the risk of creating a "cry wolf" image with your judge and jury.

When to object:

At the instant the improper question is *completed.* Premature objections, with rare exceptions, cause confusion. Should the question be proper but the answer nonresponsive, then your words should be, "Move to strike the answer on the ground that the answer is not responsive." Any delay in voicing the objection or moving to strike may be construed as a waiver.

How to object:

As you rise from your chair, the first word you utter is, "Objection." No other word will suffice. Then in a succinct, non-argumentative manner state the legal grounds. Stop, sit down! You cannot improve upon that procedure – any other language will not be as effective and will likely draw a critical comment from your judge.

> "Trial courts must restrict counsel's objections to a statement of the antiseptic legal grounds *without argument and without comment.* There should be no occasion for discussion of legal matters before the jury." *Jefferis v.Marzano* 298 Or 782, 792,196 P2d 1087 (1985).
>
> "If an attorney has an objection, the attorney shall stand and state the legal grounds for the objection without argument." SLR 6.130 (1) Fourth Judicial District.

The opposing attorney should *not respond to an objection* unless invited to do so by the judge.

Continuing objection:

A "continuing objection" is directed to a category of evidence. It avoids the necessity of repeating the objection each time the same type of evidence is offered. However, if the subsequent evidence differs or there are different grounds for objecting, the objection should be restated.

Lawyers tend to be cavalier about making continuing objections using casual expressions such as "I object to this line of questioning" or, "May I have a continuing objection?" The better practice is to specify the topic. "May I request a continuing objection to any reference to the conversation with the police officer?" The specific identification of the topic not only makes a good record, it alerts your trial judge to your concerns.

Question in aid of an objection:
The trial judge has the discretion to permit a lawyer to ask a question in aid of an objection.

EXAMPLE

Question: "Is that the signature of the decedent?"

Counsel: "Your Honor, may I ask the witness a question in aid of an objection?"

Judge: "Proceed."

Question "Have you ever observed the decedent sign his name?"

Witness: "No, not personally, but I was told that was his signature."

Counsel: "Your honor, my objection to counsel's question is lack of foundation. I further move that the last answer of the witness be stricken as non-responsive."

Judge: "Both motions allowed."

Sometimes lawyers attempt to use this procedure to obtain advance cross-examination. This is unprofessional and will draw the ire of your judge.

Editorial comment:

An unsuccessful objection may have these consequences:

- You have likely alienated some jurors.
- You have highlighted evidence that you probably would have preferred to downplay.
- You may have educated your opponent.

And you have gained nothing!

Use of depositions at trial

The following portion of a transcript, of admittedly uncertain provenance, claims to come from a court in Birmingham, Alabama. It was posted on Lexis Counsel Connect.

The Court: Next witness.

Ms. Olschner: Your Honor, at this time I would like to swat Mr. Buck in the head with his client's deposition.

The Court: You mean read it?

Ms. Olschner: No, sir. I mean to swat him in the head with it.
Pursuant to Rule 32, I may use the deposition "for any purpose" and that is the purpose for which I want to use it.

The Court: Well, it does say that.

(Pause.)

The Court: There being no objection, you may proceed.

Ms. Olschner: Thank you, Judge Hanes.

(Whereupon Ms. Olschner swatted Mr. Buck in the head with a deposition.)

Mr. Buck: But Judge…

The Court: Next witness.

Closing argument

Closing argument:
Perhaps the most challenging aspect of a jury trial is the closing argument. This is the litigator's final opportunity to persuade the jury. Closing argument should convey the message you want the jurors to carry with them into the jury room.

Before and during trial, prepare a paragraph caption outline of the topics you intend to cover during closing argument. At the end of each trial day, supplement your outline while the evidence is fresh in your mind.

- During closing don't express your personal opinion of the merits of the case or the credibility of the witnesses. A violation of DR 7-06 (4).
- Don't argue the law during closing. However, you may refer to legal instructions that the judge has indicated will be given.
- Avoid personal comments about your opponent. It is unprofessional and offensive to the jury.
- Display exhibits while you discuss their importance. Don't waste time on exhibits that are not meaningful. Avoid reading lengthy excerpts from documents.

If you represent the plaintiff, your *opening* argument should be comprehensive. Remember, your *rebuttal* argument will be limited to a response to your opponent's comments. So don't "reserve" comments for rebuttal argument. You may never have that opportunity.

- Limit your review of the evidence to the highlights. Avoid minutiae.
- Reading *short* excerpts of transcribed testimony is an effective procedure.
- Review with the jury the claims or defenses in your pleadings.
- Remind jurors how you met the burden of proof on each of your contentions.
- Identify witnesses *by their name* on a chart while you talk. Relate their testimony to specific issues.
- Unrealistic arguments damage your credibility. The sympathy approach often backfires.
- If you represent the plaintiff, itemize the claims of damages. Talk $ but have a rational and sensible basis to support your dollar claims.

Jurors appreciate frankness. Consequently, it is unwise during closing argument to urge that the *sole* cause of the accident was the negligence of the adverse party when the weight of the evidence is to the contrary. If consistent with the evidence, concede a sensible percentage of fault.

Explain to the jurors how comparative negligence works and how the percentage of negligence allocations affect the amount of plaintiffs take-home. Use the blackboard to demonstrate.

Seek leave from the trial judge to provide each juror with a work-copy of the verdict form – then review with the jury the verdict questions one by one. An alternate procedure – enlarge the verdict form 3' x 5'. On the enlargement, during closing, insert the answers you are advocating.

Remember? Audio + visual = maximum retention!

Rebuttal argument:

Plaintiff's attorney should listen intently to defendant's closing. Limit rebuttal to the significant elements of your opponent's comments. Don't give a rehash of your opening argument. Keep rebuttal brief. At this point in the trial jurors have been listening to attorneys for a long time.

Objections during closing arguments:

As during opening statements, try to avoid. Most common objection during closing. "Objection, counsel is misstating the evidence." In most cases the judge can do nothing more than to remind the jury that they are to rely on their own memory. Your objection has accomplished nothing except to focus the jury's attention on your opponent's comments.

Jury instructions

Preparing jury instructions:

Most judges favor uniform jury instructions and infrequently deviate from the uniform language. You have the right to submit manuscript (non-uniform) instructions on any point of law you wish. However, only a small percentage of manuscript instructions are given.

If you undertake to draft manuscript jury instructions, here are some suggestions:

- Don't copy verbatim dictum from appellate decisions.
- Don't copy verbatim from or use Restatement type of language.
- Be neutral (lack of neutrality is the most common cause of rejecting manuscript instructions).
- Don't be abstract.
- Don't comment on the evidence.
- Be brief.
- At the bottom of your instruction, list your authority; one or two cases at the most. Be sure you indicate the page number. Example: Brown v. Black 292 Or 348, 351. This simple task is a blessing to your trial judge.

If you modify a uniform instruction, you must identify the modification. Show the added language in *italics*, the deleted language in brackets. Clearly label the instruction "Modified."

Lodging instructions:

Check local SLRs. Multnomah County requires by local rule that instructions (two copies), verdict forms and memos must be lodged with the trial judge by noon the day before trial commences. Your trial judge appreciates having your jury instructions well before the trial commences.

Taking exceptions to jury instructions:

It is imperative that you make a proper record!

> "No instruction given to a jury shall be subject to review on appeal, unless its error, if any, was immediately excepted to after the court instructs the jury." ORCP 59 H.

You may take your exceptions orally *or in writing* or both.

While it is not required to take an exception if your requested written instruction was not given, you may wish to put your thoughts on the record. But if there has been a modification in your requested instruction, to preserve any error on appeal, you must take specific exception.

The automatic exception rule, ORCP 59 H, does not apply to verdict forms. If you believe the form of verdict used by the judge is incorrect, take exception, even though you may have submitted a requested form of verdict.

Prepare your exceptions in advance – as soon as possible. A helpful technique is to make an extra photocopy of your opponent's instructions. At the bottom of the page of any opposing

instruction that you plan to except to, make a brief note setting forth the legal basis of your objection. Highlight the language to which you object. Then, when it is your turn to take exceptions, these notes are invaluable in formulating your oral comments succinctly. While you may lodge your notes as written exceptions under ORCP 59 H, I suggest that you use your written exceptions as notes in taking your oral exceptions.

It's helpful to your trial judge to have your written exceptions as soon as possible – definitely before instructing the jury. Keep in mind that UTCR 6.090 mandates that the trial judge inform the parties before argument which instructions will be given.

Recorded or written jury instructions?

UTCR 6.070 requires that upon request, a copy of the jury instructions shall go to the jury room. The judge determines whether the copy be written or electronic.

Providing the jury with written instructions can be a logistical problem in a trial of short duration. Electronically-recorded instructions are much more feasible. More and more judges are routinely recording jury instructions and either sending the recording out with the jury or making it available upon request.

Written statement of issues:

> "Pleadings shall not go to the jury room. The court may, in its discretion, submit to the jury an impartial written statement summarizing the issues to be decided by the jury." ORCP 59 C(2).

Trial lawyers pass up a significant aid when they fail to use this helpful procedure. The written statement is useful to a jury, especially when the pleadings contain multiple claims or defenses. The typical oral summary of the pleadings by the trial judge during instructions is woefully inadequate. Without the written statement, jurors, during deliberations, must rely on their memory to recall the issues.

Preparing the written statement requires cooperation among the trial lawyers. Overcome parochial attitudes and focus on helping the jurors.

The rule mandates that the written statement be an impartial summary. The statement must be neutral, couched in plain speak and above all, brief.

Do not use pleading jargon. A helpful touch is to provide each juror with an individual work copy of the written statement of issues.

Following this paragraph is an example of an actual written statement of issues. This was a skiing accident case that involved multiple issues, including a release of liability claim, an inherent risk contention along with the traditional allegations of negligence, statutory negligence, and contributory negligence. Without such a written statement, it would be ludicrous to expect that any juror could remember the issues from the conventional recitation by the judge. A copy was provided to each juror.

Final Procedures

"It Ain't Over Till It's Over"

Typically, there is a feeling of relief when you have concluded your closing argument, but don't let up yet. There are meaningful final procedures yet to come.

Check exhibits:

Before you rest your case, check the *clerk's records* to verify that exhibits which had been received were noted as "received." Again, before the clerk takes the exhibits into the jury room, ask leave of your judge to confer with the clerk and with your opponent to check those exhibits that are going to the jury room.

Even the most dedicated and skilled clerk can make mistakes, particularly in a case with many exhibits. New trials have been granted because exhibits not received were inadvertently taken into the jury room.

Review ORCP 59 C(1) through (4).

Keep in touch:

Ensure that the clerk knows where you are at all times during deliberations. Failure to appear in response to a jury question or to be present when the verdict is received will likely be considered a waiver of any defect in those proceedings!
Never delegate the responsibility to take the verdict to any other attorney.

Questions from the jury during deliberations:

In approximately 25% of jury trials, the jurors will have at least one question during deliberations. Often the question can be resolved perfunctorily, such as requests for information that was not received in evidence or for a dictionary, or to have testimony transcribed or read back to them.

ORCP 59 D provides that when the jury "requests information on any point of law…further instructions shall be in the presence of the parties or their counsel." Trial judges, when notified that there is a question by the jury, generally instruct the bailiff to:

- Instruct the presiding juror to put the question in writing.
- Recall the trial attorneys to the courtroom.
- Record the date and time and mark the written jury question as a court exhibit.

The litigator should review the jury question thoughtfully. The answer to most jury questions can usually be found in the instructions given. The question then is:

- Shall that specific instruction be given again?
- Should all the instructions be repeated?
- Should no instructions be given?

In my experience, the sensible response is a positive answer to the juror's question. Regardless of the judge's decision, your responsibility is to make a record of any exception you have as to how the judge did or did not respond to the question.
Failure to take exception will be considered a waiver of any error.

The hung jury:

Nothing is more frustrating in a civil case than a hung jury. It is the trial judge's responsibility, when the jury reports that they cannot reach a verdict, to interrogate the jury and factually verify:

- That the jury is, in fact, deadlocked, and
- That further deliberations will not bring about a verdict.

The verification must be in open court and on the record. If the deadlock is verified, the judge should declare a mistrial. Again, it is your duty to make a record if you disagree with the judge's decision or procedure.

The jury cannot be dynamited, but the trial judge may give UCrJI 10.23, which encourages the jurors to "re-examine their views."

When confronted with this vexing problem, review *State v. Ortega*, 20 Or App 345, 348, 531 P2d 756 (1975) and *State v. Marsh* 260 Or 416, 423, 490 P2d 491 (1971).

Receiving the verdict:

ORCP 59 G(1) sets forth the procedure. Your responsibility is to ensure that the verdict is correct as to form *before the verdict is received, filed and the jury discharged.* Once that jury is discharged, it is impossible to correct any defect in the verdict.
Listen carefully as the verdict is read. Ask the judge for permission to skim the verdict before the jury is discharged.
Polling the jury is a sensible procedure if you are the losing party. The court must poll the jury at the request of any party. Read: *Sanford v Chev. Div. Gen. Mtrs.,* 292 Or 590, 613,642 P2d 624 (1982).

If there is any problem with any aspect of jury deliberations, the verdict, or polling the jury, *immediately* get on your feet and say, "Your Honor, before the verdict is received and the jury discharged, I have a matter for the court."

You must make your record before the jury is discharged!

Custody of exhibits after verdict:

UTCR 6.120 provides several options concerning exhibits. It should be reviewed carefully. Consider withdrawing exhibits. This is permissible only by stipulation.