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PERSPECTIVE

Some lawyering 'rules' were meant to be broken, part 2

By Arash Homampour

Law is a rules-based profession for a reason. Attorneys are trained to understand and interpret basic to complex rules that instruct how we all live and work together. They are governed by rules of procedure and ethics that protect the public and maintain the integrity and stature of the profession.

At the same time, many lawyers are creatures of habit, and those habits can become yet another set of hidebound rules.

This column looks at more norms that constrain lawyers without serving a purpose.

Standing Your Ground Against Impatient Judges

Selecting a jury is perhaps the most important job a trial attorney can perform.

The law is clear that attorneys must be given wide leeway to seat an impartial jury: "During any examination conducted by counsel for the parties, the trial judge shall permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case before the court." CCP Section 222.5(b)(1).

A judge cannot "impose specific unreasonable or arbitrary time limits or establish an inflexible time limit policy for voir dire" (CCP Section 222.5(b)(2)), and an attorney who surrenders to a judge's call to speed things up or artificially curtail questioning is doing a huge disservice to the party he represents.

Without being rude or discourteous, lawyers should realize that they often must stand their statutory ground and take the time necessary to adequately question prospective panelists, even if the judge would prefer the process move quicker.

Lawyers should remind judges that the range of topics and the scope of questions in voir dire is broader than what the judge may have thought. Case facts and unique issues of law can and should be shared with the panel. How can they know if they can truly be impartial if the facts of the case or legal issues aren't disclosed? Judges are required to allow a mini opening before voir dire if either side requests it — even if both parties do not agree (CCP Section 222.5(d)). This is an effective way to cover all of the key factual or legal issues jurors will be asked to decide or consider.

Parties are entitled "to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence" *People v. Pearson, 56 Cal.* 4th 393, 412 (2013), and judges are obligated by CRC, Standard 3.25(a)(2) to consider "(1) any unique or complex elements, legal or factual, in the case, and (2) the individual responses or conduct of jurors that may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case."

Finally, attorneys should push back against judges who deny for-cause dismissal of jurors who state they cannot be fair to a specific issue, e.g. an element of a damages award, but later say in abstract that they can be fair. The law defines "actual bias" as "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." CCP Section 225(b)(1)(C) (emphasis added).

If a juror cannot fairly award emotional harm damages, she cannot be "entirely impartial" and is biased. Any later statement, in response to further questioning from the court, that she believes she can be fair will not magically rehabilitate her as an impartial juror. It's not a question of bending the rules; it's about adhering to the letter of the law.

An attorney who appears in court must know the law better than anybody else, must be able to explain that law to the court and the jurors, and must create a record for appeal, if necessary.

Public Image and Ego No Amigo

The most successful attorneys celebrate the success of others as much as their own accomplishments, recognizing that there is space for everyone to shine. While, there is nothing wrong with tying your brand to success, clients should have confidence your financial success is directly tied to your own efforts. The most successful lawyer in court is the "zen lawyer" who can remove himself from the story. He knows that sugar is more effective than poison, going in for the win without alienating others, but holding wrongdoers accountable.

The old norm is to use academic credentials as a metric for one's competence. The new school recognizes results over resumes. It rewards those who can connect with a client and with the twelve strangers (aka humans) who will decide that client's fate.

The old norm says that law is primarily a vehicle to make money. The new school says that you shouldn't do it unless you love it. Be humble, and ask yourself every day: How many people can I help? The most successful legal professionals are not in it for themselves but use their talent to make the biggest impact they can.

Self-Care

Lawyers have been trained to work hard. The prevailing norm says that we must work 60 plus hours a week, with no real life outside law or the courtroom. The new norm says that in order to be our best, we must take care of ourselves. This means taking the time to find those passions that light up your life, to restore and to rejuvenate. One must also work more efficiently in order to free up time to live a balanced life.

If there was a silver lining from the COVID pandemic, it was the discovery that most of our work can be done remotely. Instead of spending precious time in traffic, we can be talking with clients via Zoom or Skype. Instead of dressing up and commuting for a brief court appearance, we can attend virtually. Depositions conducted over shared media can actually be better than those we sit through in person.

We owe it to ourselves, our clients and our profession to remove our hands — and our egos — from every single task, decision and gain in our profession. The world will continue to turn, work will get done, and our lives will be infinitely more healthy and enjoyable. More importantly, we will have more time to make a wider impact with our talents. ■

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