

“IT’S BEEN A GREAT RUN!”

Governor Deukmejian’s telephone call to me at the end of December, 1983 appointing me as a judge of the municipal court, and a few years later to the superior court, changed my life permanently and for the better. In fact, I consider my being able to serve on the bench with such fine judges, staff and attorneys for the past 25 years to be an unmitigated blessing! So as I face my coming retirement at the end of this year and enter into a different phase of my professional life, I jumped at the opportunity to share some thoughts with you my colleagues about what I have learned, insights I have gained, and even a few recommendations for changes in our system that I believe should be made.



The first thought is to thank you as individual practitioners for the opportunity to serve with you. Practicing law in Orange County has almost always been a professional treat, and I appreciate the professionalism with which my efforts have been received. In fact, I will resist the temptation to say that the entire system of justice in Orange County will collapse without me, because I know that we have such a strong bench and bar. In other words, I know that justice in our county will continue to be in good hands.

Secondly, I extend my sincere thanks to the Orange County Bar Association and other similar groups for their professional kindnesses to me over the years. Throughout my time on the Bench, all of these groups have they been universally gracious and considerate to me, and it is deeply appreciated. But in addition, as some of you may be aware, when I intentionally took on a controversial issue, it was the Bar that took a public position of support for my ability to state my case, when several other people in our county were not quite so generous or understanding. My family and I will always be grateful for that important support.

Furthermore, we judges are able to fulfill our judicial assignments effectively and within the law in large part because we have the assistance of highly able and dedicated court clerks. Their positive contributions cannot be overstated. When I first became an officer in the Navy I was advised to listen to the chief petty officers because of the practical knowledge and wisdom they had garnered, and that was excellent advice. I strongly recommend that judges and attorneys alike listen carefully to our clerks for the same reason. I still remember an occasion when I was new on the bench and about to order a particular sentence in a criminal case when I heard the voice of my clerk drift up to me saying: “You can’t do that.” So, in my learned wisdom, I promptly decided that maybe I should structure the sentence a little bit differently. That beneficial service has continued throughout all of these years. So please join with me in giving our clerks the appreciation and respect that they so richly deserve.

What has it been like to be a judge? It does take patience, to the degree that we are the only people in the courtroom that can never lose their tempers. And it is hard, after having been a trial attorney, to sit back and listen to the cross-examination of witnesses and be dying to jump in and ask *the* question that will show if they really know what they are talking about or not. But instead we must be quiet. This situation reminds me of a cartoon I saw a long time ago of two buzzards sitting on a fence, with one looking at the other and saying: “Enough with patience, I want to go out and kill something!”

But as I bequeath my seat to a new judge, I have been reflecting about some professional insights I have gathered from my 25 years on the Bench, and for whatever they are worth, I wanted to share some of them with you. They are as follows:

Keep family first! Okay, this is easy to say. I know that you have important responsibilities to your clients, you must be knowledgeable and prepared under all circumstances, and you have to pay the bills. But your spouse really does want a wife or a husband, as the case may be, in addition to a breadwinner; your children do not grow up in reverse; and your parents and even your siblings will not be with you forever. So in this, like in everything else, remember that the main thing is to keep the main thing the main thing. And I hope you agree with me that the main thing in our lives is our family.

At all costs, maintain your integrity! Attorneys or judges who compromise their integrity enormously decrease their value both to the parties they are working with currently, and those they will be involved with in the future. It takes such a long time to earn a good reputation, and such a short time to lose it. Judges must strive to acquire and maintain their integrity, but so must attorneys. In fact, judges know full well that when attorneys go to lunch together, they often talk about judges. But guess what judges talk about when they go to lunch together? So bear in mind that often there is a definite difference between what is legal behavior, and what is ethical behavior, and act accordingly. You will never be sorry.

Do not oversell your case to your client! I know there is lots of competition to get and keep good clients, and the temptation can be large to promise them more than the case is worth. But strongly resist the temptation. If you oversell the case, no matter how well you perform later either in your settlement efforts or at trial, your client will still be dissatisfied with the results. And then you will not get any repeat business or referrals, even though your performance may have otherwise earned it.

Have a theory of your case! From the moment you begin to work on a case, whether it is for plaintiff or defendant, begin to formulate a theory of your case. The theory certainly may change, and you may have more than one, but focus your thoughts and develop it. Then in *everything* you do in the case, ask yourself if that action will further your theory or not. Every motion or objection you make, or don't make, every question you ask, or don't ask, should further your theory or theories of your case. Over the years it has been sad to see that some attorneys, even after they have completed their

opening statements, still do not have a theory of their case. And the results at trial show it!

Focus upon the shades of meaning of words. Words are the building blocks of our profession, and we should craft their usage with care, both orally and in writing. For example, how often do plaintiffs' attorneys in auto v. auto cases lazily fall back upon the word "accident" to describe what occurred? Many times I have waited for a plaintiff's attorney to object that defense counsel's use of that word assumes facts not in evidence. Not only in cases in which the defendant had been driving under the influence of a mind-altering substance, but also in those cases that involve speeding, running a red light, or otherwise violating the Vehicle Code, maybe this injury to the plaintiff was not an accident. But I have never heard the objection.

In addition, there are many other more descriptive words that could be used that, when appropriate, can set the tone in these cases for plaintiffs, such as collide, strike, impact, careen into, slam together, or smash into. Similarly, defense attorneys should, when appropriate, choose words that tend to downplay the incident like touch, graze, come together, bump, or come into contact. Of course this approach applies to all other types of cases as well, but it is surprising to me how seldom it is used.

One shade of meaning that applies to virtually every case is the difference between the word "solve," as opposed to the word "resolve." Mostly only mathematical equations can be solved. But most problems dealing with human conduct and affairs can only be resolved – usually by one side paying some amount of money to the other side. Unfortunately, most litigants do not understand that their problems really have no solution because their counsel do not discuss that fact with them. I often tell litigants that we in the court system are in the "dissatisfaction distribution business," because mostly everyone leaves dissatisfied with everything, except for the fact that they can now leave. But if we can finally resolve their case within 15 percent of "fair," we will have done a good job. And usually they will be more satisfied and amenable to settlement if they understand that there is no actual solution to their problem, just a resolution.

There is a zone of settlement. If a case will settle at all, it will almost always do so within a range that I call the zone of settlement. When I was an attorney I realized that fact, and tried to settle my cases "in the upper area of reasonableness" for my client. The best way of doing that from my experience is, of course, to be prepared about the facts and law of the case, time the settlement conference so that it occurs right after a favorable deposition, motion or other event in the case. And then during the settlement conference openly acknowledge the weaknesses of your own case. At this point you will have established your own credibility, so everyone will listen when, in the same fashion, you "openly acknowledge" the weaknesses of those parties opposed to you. Then *never* use words or phrases that drive people away from a position of settlement, such as liar, cheat, fraud, nuisance value, or, in more extreme cases, slimeball, etc.

Program yourself to "give back." Pro bono work is a great and positive thing, and all attorneys should engage in this as a matter of course. We have all been blessed in

so many ways to be who we are, do what we do, and have what we have. As such, many believe it is our professional responsibility to engage in a continuing effort of offering our services without charge to people who cannot otherwise afford us. And besides, if you make that contribution, you will join those who understand the concept that giving is actually receiving.

Don't sell yourself short. As stated above, pro bono work is a great thing to do. But as much as possible, try to let this work be your choice, and not your client's. In this regard remember that if you don't sell yourself short and if you charge (a little less than) what you are actually worth, when you are successful your clients will refer other potential clients to you who will be prepared to pay those same regular rates. But if you cut your rates for a "deserving" client, when the case is over and you are successful, that client will send you lots of other "deserving" people who will also want you to work for those same lower rates as well.

Basically our system is working. From my perspective, there are basically two ways in which we can keep people safe in our communities and uphold contracts in the marketplace: our present civil justice system, with all of its problems, on the one hand, and even greater governmental regulation on the other. But no one I know wants more government regulation except the regulators. So if you agree with me, take advantage of the opportunities you have to let both jurors and the general public know that what we are doing is basically working, and that they should be proud of us for that.

Take steps to reduce the costs of discovery. Today's discovery rules generally drive up the costs of litigation. But as you know, Federal Rule of Civil Procedure 26 requires, with only limited exceptions, counsel to provide opposing counsel, early in the action, all documents that the disclosing party may use to support its claims or defenses and a list of their testifying expert witnesses with their addresses, as well as a summary of their testimony that they will present in their case in chief. As a favor to your clients, I recommend that you formally stipulate with opposing counsel to utilize this rule in our state courts as well. This will still provide you with the information you need to represent your client, but it will also significantly reduce the costs of discovery.

To some degree, it pays to be a joiner. Joining and being an active member of the organized bar and its affiliate organizations, an Inn of Court, ABOTA, and the OCTLA is not only fun, but it is professionally worthwhile for many good reasons. You will meet good and interesting people; you will learn more about our profession (in addition to getting MCLE credit); and you will probably get good client referrals. But more importantly, you will be a more meaningful part of our great profession, and be able to make contributions to it and, therefore, to society in general. We are a great and proud profession, and we have every right to hold our heads up high for what we do. And there is no better way to be a constructive part of it than by being an active participant in professional organizations.

Finally, by convention and protocol, we all know that judges are supposed to be addressed as "The Honorable." Of course, to be honorable, people must not only be

honest, but they must also do what is morally correct. That is a major challenge that no human being can consistently live up to. I openly acknowledge to you that at various times I believe I have both succeeded and not succeeded in meeting that challenge. But I have tried. And along the way I want you to know that I have been proud and truly blessed to have held the position of a trial court judge in Orange County. In truth, I have been genuinely humbled by the experience.

And I have also loved it. What other position allows you to work with good people in interesting circumstances and try to do the right thing under the law for the right reason? And what position also allows you to have some extra time to help set up programs to help meet the needs of our great profession and of society in general? In fact, I still remember waking up on one Saturday morning more than 20 years ago and thinking to myself “Oh nuts, I don’t get to go to work today.” Then I smiled and figured out that somehow I could stumble through the weekend. But I felt that way about the job back then, and I still feel that way now. And I am really going to miss it.

James P. Gray is a judge of the Orange County Superior Court. He assisted in founding Orange County’s Peer Court program, Orange County’s Drinking Driver Program, the William P. Gray chapter of the American Inns of Court, and the Former Assistant US Attorney’s Association, and has been awarded an honorary doctorate of jurisprudence degree from Western State University School of Law and from Chapman University School of Law. He can be contacted at JimPGray@sbcglobal.net or at his website at www.JudgeJimGray.com. In addition, Judge Gray invites you to come to his retirement party of celebration and appreciation on Friday, January 23, 2009 from 5:00 to 6:30 p.m. at Ambrosia Restaurant, 801 N. Main Street in Santa Ana.

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