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TECH TIPS FROM THE BENCH: AN INTERVIEW WITH HON. EMILIE ELIAS



Jordan McCrary

Here are nine technology tips for litigators based on my recent interview with Los Angeles Superior Court Judge Emilie H. Elias, presiding in Department 324 of the Central Civil West Courthouse. Judge Elias is the Supervising Judge of the Complex Civil Litigation Panel.

1. Embrace e-service. Lawyers appearing before Judge Elias are required to use e-service. In most cases, counsel may pick which e-service provider to use. When a document is e-served, counsel receives an e-mail notification, and the document is stored on an electronic database that can be accessed anytime, anywhere there is an internet connection.

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HOW TO TALK TO A JUDGE



Hon. Elizabeth A. Grimes

In a recent conversation with Aaron Bloom, YLD co-chair, Justice Elizabeth Grimes mentioned how important it is for lawyers to know how to talk to a judge. That conversation led to this article, a collaboration among an appellate justice, a trial judge, and a trial lawyer.

It Is Not Just About the Briefs.

In law and motion hearings, lawyers too often expect the judge to engage counsel in discussion only of the evidence, its admissibility, or the fine points of the law in dispute. While you must be thoroughly prepared to discuss such matters, if you have done your job well in briefing, the judge will know what facts and law are in dispute, and at the hearing, the judge may be looking to you for help in resolving the bigger picture. Ah, you say, but how can I know what the judge perceives to be the bigger picture?



Hon. Charles E. Horan



Michael D. Stein

Put yourself in the court's shoes, and think about the daily life of a trial judge, a large portion of which consists of battling to get lawyers, jurors, witnesses, and courtroom staff all in position to begin work. It is a bit like herding cats. Everything you

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Not only are e-served documents remotely accessible and centrally organized, e-service avoids disputes over whether or when service took place. Lawyers are not the only ones who benefit. Judge Elias and her staff use e-service to circulate orders and efficiently communicate with dozens or even hundreds of parties at a time. Also, Judge Elias and her staff often pull parties’ papers directly from the e-service database because they can do so remotely, and it is quicker than the court’s official, decades-old document management system, which still runs off MS-DOS.

2. Appear via videoconference (not just by phone).

Judge Elias allows attorneys to appear via videoconference through CourtCall. This technology provides all the benefits of a telephonic appearance plus a view of the courtroom. All you need is a computer with a video camera and an internet connection. The courtroom is equipped with a large monitor that displays the remotely appearing attorney and two cameras, one trained on the bench and the other on counsel table, allowing the remotely appearing attorney to pick up on non-verbal communications and tailor arguments accordingly. This technology is offered to all attorneys scheduling a standard CourtCall telephonic appearance, and it costs only a few dollars more, yet surprisingly few attorneys take advantage of it. Those who do not “are missing out, because you get so much from seeing facial expressions,” said Judge Elias. Notably, this technology is not just for attorneys: witnesses also have appeared via videoconference.

3. Bring your laptop. Judge Elias’ courtroom is equipped with WiFi that you may use. You log on to the network “LA Guest” and no password is required. Unlike some other judges, Judge Elias does not mind attorneys using laptops or mobile devices while waiting for their case to be called. But, put such devices away at counsel table or when a jury is present. Even then, have your device available if Judge Elias asks you to look up something.

4. Email proposed orders. Because Judge Elias may need to revise your proposed order, consider asking for the court’s email address (it will be provided when appropriate) to email an editable version of the proposed order in Word format. You still must file a printed copy for the official record.

5. Test your set up in advance. Department 324 is equipped with a large monitor and a digital projector that counsel may use. You may also bring your own hardware. Whatever you do, arrange for a time to test the equipment in advance. Generally, Judge Elias’ staff will find time for you to access the courtroom on the morning of your presentation or the day before. During your visit, be sure to identify the closest electrical outlets to supply your devices with power.

6. Bring a technology professional. Even if you are comfortable with the technology that you will be using, consider retaining a technology professional to assist you. According to Judge Elias, bringing a technology professional to trial is the norm. Doing so allows you to focus on your presentation, rather than fumbling to do multiple things at once.

7. Have a backup plan. Technology failures occur. Hardware dies. Batteries run low. Files become corrupted. So, back up all your files and have substitute equipment available. If problems arise, Judge Elias will generally allow a brief recess. But if a problem cannot be fixed, you must be prepared to move forward without your technology. So, bring printed copies of important documents as a last resort.

8. Call to resolve discovery disputes. Judge Elias accepts conference calls to informally resolve discovery disputes. For example, parties may agree to call the Judge directly from a deposition, and she will take the call if she is available. Alternatively, to ensure that the Judge is available, parties may schedule a time for a conference call. Of course, attempt to resolve disputes before involving the Judge. If you cannot meet in person, consider using FaceTime or Skype to communicate with opposing counsel. Face-to-face communications promote civility and make it more difficult to maintain unreasonable positions. Through calls, disputes are often quickly resolved, avoiding expensive travel, letter-writing campaigns and motion practice. Because Judge Elias accepts conference calls and finds them to be more efficient, she does not accept messages from parties sent via e-service platforms (though some other judges do).

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DID YOU KNOW? TIPS ON CALIFORNIA APPEALS

Conflicting Appellate Court Decisions



David M. Axelrad

A dispositive California Court of Appeal decision virtually guarantees your summary judgment motion will be granted. The problem is your golden ticket case comes from the Court of Appeal in Fresno and your case is in Los Angeles where the local Court of Appeal has reached the opposite result. There is no California Supreme Court case on the issue. How can you ask the trial court to follow your Fresno case when the local Los Angeles Court of Appeal decision is against you?

Do not despair. Where there are conflicting Court of Appeal decisions, the trial court is not bound to follow the local Court of Appeal decision. The court can and must choose the decision it thinks best. “[W]here there is more than one appellate court decision, and such appellate decisions are in conflict . . . the [trial] court . . . must make a choice between the conflicting decisions.” (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456.) It’s true that “[a]s a practical matter, a superior court ordinarily will follow an appellate opinion emanating from its own district even though it is not bound to do so” (*McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315, fn. 4), but don’t be deterred from relying on and advocating for the best of conflicting Court of Appeal decisions, no matter where they come from.

Are Posttrial Motions Necessary?

A California state court jury returns a large money verdict against your client. You believe the Court of Appeal is likely to reverse because of a legal error during trial. Should you go straight up on appeal or should you first file posttrial motions?

No matter how good your appeal may be, you should probably file posttrial motions. Here are two reasons why, on your way to the Court of Appeal, you may need to ask the trial court to take another look at the case:

- a. A claim of excessive or inadequate damages is waived

on appeal if not raised in a timely motion for new trial. (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 759.) (Caveat: Legal errors in the trial of damages, such as evidentiary or instructional errors, or application of the wrong measure of damages, are not waived by failure to move for a new trial. (*Ibid.*))

- b. The trial court has authority not only to grant judgment as a matter of law to the losing party (Code Civ. Proc., § 629, 663), but also, on motion for new trial, to reweigh the evidence and order a new trial if the weight of the evidence appears contrary to the jury’s verdict (e.g., *Candido v. Huitt* (1984) 151 Cal.App.3d 918, 923). (Note: the trial court has equally broad authority on a motion for new trial following a bench trial. (Code Civ. Proc., § 660.))

While appellate courts also have authority to order judgment as a matter of law for the losing party (Code Civ. Proc., § 43), they lack the trial court’s authority to reweigh the evidence (e.g., *Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 919). So, where posttrial motions are filed, a trial judge who is skeptical or surprised by a verdict has greater power than the appellate court to grant relief to the losing party.

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9. Avoid distractions. Keep visual presentations simple and concise. Make sure text is readable and images are sharp. Use short statements and key words to maintain focus. Do not use distracting noises or moving images that divert attention away from your message. While technology can enhance your presentation, it can also detract. So, use technology judiciously to emphasize key points and important aspects of evidence.

While technology cannot replace the skills of a good litigator, and it won’t make a good advocate of a poor one, when used correctly, technology can make every lawyer better.

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