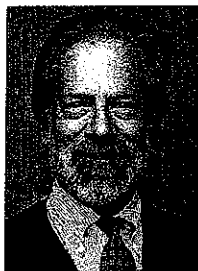


By Judge Peter M. Lauriat

Observations From The Bench:

Eight Ways to Succeed At Trial



Hon. Peter M. Lauriat has been an Associate Justice of the Massachusetts Superior Court since 1989. Prior to joining the Superior Court, Judge Lauriat practiced law for 17 years, specializing in civil and criminal litigation.

Judge Lauriat has taught at Harvard Law School and the National Judicial College, and has written and lectured nationally on litigation and jury trial issues and techniques. He is an editor and contributor to several publications, and is a member of the Massachusetts Supreme Judicial Court's Jury Management Advisory Committee.

One of the occupational hazards of sitting on the bench is being asked frequently about those things lawyers do that most please - or displease - the judge. Each of us has observed, over years of experience, a number of acts or omissions by attorneys who appear before us that please us immensely or drive us to distraction. At the request of the Board of Editors, I herewith present my list of the esteemed and egregious, which are really both sides of the same coin.

Share with jurors. Jurors and exhibits are two important components of a jury trial. Yet too many lawyers, who work hard to seat good jurors and get important exhibits into evidence - then fail to share the latter with the former. Successful lawyers will share every admitted document and photograph with their jury - passing them among the jurors, giving them copies, creating notebooks of admitted exhibits for them, using blow ups or displaying the exhibits on a television monitor. Keeping exhibits from the jury until deliberations simply does not work.

Minimize objections. Too often, a lawyer will object to questions, answers or other evidence that while objectionable under our rules of evidence, are not harmful to their case. A wise attorney will evaluate the question's effect or impact, and save objections, and the judge's and jury's patience, until a matter arises that is not only important, but could have an impact on the outcome. While this decision must often be made quickly, over time lawyers can learn to make it effectively. The fewer

unnecessary interruptions that the jury observes or endures, the better.

Limit side-bars. Surprisingly to some attorneys, judges are not fond of side-bars. Needless to say, neither are jurors. A corollary to avoiding unnecessary objections is not wearing a path to the side of the bench. Both judge and jurors appreciate an economical, briskly paced presentation of evidence, interrupted as infrequently as possible. While seeking numerous side-bars may not make or break your case, it may affect the jurors' view of your confidence in your claims or defenses. "What was he or she trying to hide" is a frequent comment from jurors when I ask them after trial about their reactions to side-bars.

Avoid repetition. One of the most frequent complaints that jurors, and judges, voice is about questions that are asked repeatedly of a witness, or of several witnesses. For example, asking the sixth expert medical witness what it means to be board certified will cause audible groans among jurors. In those circumstances, I have been tempted to ask if anyone still does not understand the process of board certification. Jurors usually get it the first time, and if they don't, one will usually ask me to ask the witness a similar question (note my subtle plea to allow jurors to ask questions).

Prepare instructions carefully. A lawyer will have a much greater chance of securing the use of proposed instructions if they accurately and impartially reflect the law. Instructions that misquote or misstate the law are not only disfavored, but reflect poorly on the lawyer who

prepares them. Drafting instructions that concentrate on the really contested issues, and getting them to the judge, one double-spaced instruction per page, with relevant citations, as far ahead of the end of the trial as possible, enables the judge to evaluate, analyze, and ideally adopt them – in whole or in part.

Observe page limits. In the Superior Court, the 20 page limit on memoranda that is mandated by Rule 9A(b)(4), is a maximum, not a minimum. Mark Twain once said: "If I had had more time, I would have written you a shorter letter." The same maxim applies to briefs. Rather than fill twenty pages because the rule allows it, revise, sharpen and concisely develop your written arguments. One of the real pleasures in judicial life is reading a well-crafted, finely wrought memorandum of law. And slogging through the brief that reflects none of these concepts is a burdensome task.

Try to settle. Every case that reaches trial has a settlement value. Plaintiffs' lawyers who make unrealistic demands

based on their unrealistic determination that they have a slam-dunk claim - and defendants' lawyers who offer nothing based on their similarly unrealistic assessment that they can't lose, are frequently misleading not only themselves but their clients. Judges, especially those who have tried many cases over many years, can often provide a reality check on lawyers' enthusiasm for their cases, if only the lawyers would listen. While I try to refrain from valuing the particular case that is before me, I will usually describe my experiences with jury verdicts in that kind of case. Attorneys don't have to accept my statements, but they do need to share them with their clients and to be realistic about their likelihood of success - on either side. If not, they may be in for a rude surprise.

Get the time right. Finally, an observation about lawyers who fail to estimate realistically the length of their trial. I will always tell attorneys that I intend to tell the jury that the anticipated length of the trial is based on the lawyers',

rather than my own, estimate. When the trial exceeds their estimate, often by several days, the jury tends to look less kindly upon the attorneys, especially if those attorneys have engaged in some of the practices described above. While I can't say for certain that this affects the jury's verdict, it usually begets a one-way correspondence from the jury proclaiming their frustration and unhappiness. One juror wrote me:

"You informed us that this would be a seven to ten day trial. It is now the eleventh day and I can't see it ending soon. . . . I find myself becoming extremely hostile towards the lawyers for wasting so much time and treating us like children. . . . I have a very low tolerance for this type of action."

Although direct statements like this are uncommon, they reflect the jurors' (and my own) desire to see an efficient, effective and concise presentation of the parties' cases at trial. Hopefully, these observations will encourage lawyers to strive toward those goals. ■

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