How Judges Influence Advocacy

by Patrick M. Flaherty and Patrick M.Kinnally

Judges determine the outcome of cases in many obvious ways. Deciding motions to dismiss and motions for summary judgment and ruling on trial objections and on jury instructions, just to name a few. These decisions are usually based on specific legal concepts or defined legal principles.

What is less well appreciated are the subtle ways judges influence advocacy, especially during jury trials. Most of these arise from seemingly harmless practices or from rulings on what have become routine motions. These matters are important to anticipate because they often arise without notice, they have a substantial but unappreciated effect, and the decision or practice almost always falls under the protective umbrella of "judicial discretion."

Judicial discretion, for the most part, is a good thing. It allows a trial court to ensure fairness within the context of the facts and the law. It comes with the unpredictability of human foibles but it is an important tool and lawyers should respect it. Nevertheless, the exercise of discretion should always be tempered by the reality that trials are intended to be adversarial and that justice is best achieved by letting lawyers advocate and jurors decide.

Here are some of the subtle actions that can influence advocacy and some ideas for handling them.

Motion Calls During Trial

The decision to keep a motion or a case management call during a jury trial (especially a long one) can be seen as disrespectful and even hypocritical. It results in unpredictable start times, unnecessary waiting (by jurors, parties, witnesses and lawyers) and increases the overall length and cost of the trial.

It is disrespectful to the jury because we ask them to sacrifice jobs, families, and time to perform a vital public service and then we go out of our way to make it frustrating and difficult. It is hypocritical because we emphasize the importance of jury service in order to secure participation yet we fail to give jurors the priority implied once they are seated.

The well being and convenience of the jury should be our first consideration. It overshadows the consequences of delegating routine business, including any burden imposed on other judges or any loss of control over case dockets. We cannot ask citizens to sacrifice and fulfill a civic duty and then fail to extend to them the common courtesies we afford a guest in our home. That is not asking for too much.

The danger to advocacy of business as usual is clear. How we treat the jury can impact the jury's attention, patience, attitude and perception, making a fair and impartial assessment of the facts difficult or impossible. The irony is that this danger comes not from undetected bias during jury selection but from conditions the court system creates after jury selection is complete.

In delivering justice, we try to solve problems for people who cannot solve them alone. People rely on our justice system for a quick but just resolution. Dispatch and continuity at trial are therefore paramount. Without it, the perception of fairness is lost, as is respect for the system we work so hard to protect.

Introduction to Venire

What a judge says to the venire and how he or she says it influences the attitude of those jurors ultimately seated. The video shown to the venire is not a substitute for an inspirational talk from the judge about the nobility of the law and jury service. Retired Judge James Quetsch, a long time trial lawyer, always gave an impassioned and heartfelt speech before jury selection. He made them feel the significance of what they were asked to shoulder. He made it the "big deal" it really is.

From the perspective of a trial lawyer, there are two broad issues a judge should address. One is the importance of jury service. The second is the process of jury selection. There are many ways these two issues can be addressed. Here is one example for each.

Jury Service

> Thank you all for being here. I know for most of you this is a sacrifice. You have taken time from your families and your jobs and the burden on you is not an easy one. But let there be no mistake, what brings you here is also an extraordinary opportunity. You are being asked today to participate in democracy and in justice. How often does that happen? Along with voting, jury service is the highest calling of citizenship. It is one of the most important civic duties you will ever be asked to perform.
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> As a group, you are the guardians of a very special heritage. You sit in a grand tradition that dates back centuries to Medieval England. It was determined then that people would no longer be judged by a monarchy or privileged class. Rather, in a democracy, disputes between citizens or between citizens and government should be resolved by members of the community. Twelve different people, strangers, drawn together in one room to decide a dispute in which they have no personal interest. Twelve different minds,

twelve different hearts, twelve different walks of life. All melded together into a single voice--the voice of the community. This is a remarkable institution and it is one of our most important safeguards against tyranny. Everyone in this room has enormous respect for the institution you represent and for your willingness to accept the responsibilities it entails. Thank you again for being here.

Jury Selection

The process of jury selection is called voir dire. This is a French phrase meaning "to speak the truth." Our goal is to find twelve people who can judge this case fairly and impartially. Jury selection is something like a job interview. Not everyone is suited for every job. And not everyone is suited for every case. What determines whether or not you are suited for a particular case is whether you hold any opinions or beliefs so strongly that it would interfere with your ability to judge that case impartially on the facts heard in the courtroom.

Asking someone if they can be fair and impartial may seem like a loaded question. Who wants to admit they cannot be fair? When we ask if you can be fair and impartial, however, we are simply asking if you can set aside your preconceived ideas or opinions and decide this case solely on the basis of the facts and the law you hear in the courtroom.

We all develop opinions and points of view over our lifetime. We hold these opinions with varying degrees of intensity. Some we are able to set aside and some we are not. Some may influence our judgment and others may not. Whether this is the proper case for you depends on whether you can set aside any preconceived ideas you may have on the issues in this case and make your decision solely on the basis of the evidence heard in court.

We will be asking questions to determine whether this is the right case for you. We do not mean to embarrass you or to make you uncomfortable by any questions we ask. The key to obtaining an impartial jury is the candor and forthrightness of each of you. Ask yourself whether you are the kind of juror you would want if this was your case. If any of you have opinions on issues in this case that you cannot set aside or that may influence your judgment, it is important that you tell us you cannot be impartial. We all have such views on different issues. If this case involves questions of that nature for any of you, please let us know. It is the only way the system can work for all of us.

Explaining the Absence of Parties

Defense attorneys often ask the judge to read a statement to the jury essentially "excusing" a defendant from being in attendance everyday at the trial. It happens in medical negligence cases where a defendant physician does not want to ("can't") take off every day from work. The proposed instruction often says "Dr. Smith has professional obligations that may prevent him from being in attendance every day during the trial."

An instruction like this is patently unfair and should not be given. It diminishes the value of jury service. It implies that the physician is superior and deserves special treatment. It suggests that his or her occupation is more important than the job of the jurors who are expected to miss work and be in attendance every day. Giving such an instruction judicially validates this impression and effectively increases the burden of proof on plaintiff. The decision to attend or not to attend every day is a choice. No party should be immunized from the consequences of that choice, particularly when to do so gives one party an advantage over the other.

Excluding Witnesses

Parties routinely make a motion before trial (often orally) to exclude non-party witnesses from the courtroom until after they testify. The motion is always granted. There is no statute or rule that mandates exclusion--it arises from a common law practice designed to prevent collusion and fabrication.[1] The court has discretion to grant the motion and that decision will not be reversed absent clear abuse or clear prejudice.[2]

It is easy to determine who non-party witnesses are in most cases but it can be controversial in wrongful death cases. In those instances, the technical plaintiff is the special administrator whereas the real parties in interest are the surviving next of kin.[3] Defendants usually seek to exclude the next of kin (except the special administrator) on grounds that the administrator is the only plaintiff. This argument ignores the unique role of both the administrator and next of kin.

Illinois Pattern Jury Instruction number 31.09 states that the special administrator brings suit only in a representative capacity and does so on behalf of the next of kin. The instruction also states: "They [next of kin] are the real parties in interest in this lawsuit, and in that sense are the real plaintiffs whose damages you are to determine . . . ."[4]

It is unfair to exclude the next of kin when they are treated as parties for all other purposes. They hire and pay the lawyer, they receive the money at the end of the case if a recovery is made and they are subject to adverse examination as a party under section 5/2-1102 of the Illinois Code of Civil Procedure.[5]

A decision to exclude the next of kin has obvious consequences for advocacy. The jury can interpret absence at trial as disinterest in both the case and in the deceased and thereby reduce damages awarded for loss of society.

The jury is there everyday but the people bringing suit and claiming loss are not. That image clearly undermines the loss asserted. If next of kin are excluded, the court should minimize the prejudice created by giving an instruction at the start of trial that the next of kin are not allowed by law to be present until after they have testified.

Order of Witness Examination

In a case with multiple defendants, an issue can arise about the order in which defendants will examine witnesses. Illinois Supreme Court Rule 233[6] provides that the order of examination is determined by the order in which "they appear in the pleadings unless 'otherwise agreed by all parties or ordered by the court.'"[7]

Straying from the order of the pleadings can impact advocacy and should rarely be allowed. In some cases defendants propose that they determine order amongst themselves or that the defendant most impacted by a witness decide whether to go first or last and that the remaining defendants follow the pleadings. In cases where the witness impacts all defendants equally (*i.e.,* an economist or vocational expert), it has been proposed that defendants determine the order.

Allowing defendants to orchestrate the sequence of examination allows them to coordinate a defense behind the scenes and yet maintain an appearance of individuality in front of the jury. It allows defendants to cooperatively plan examinations so as not to implicate or undermine one another during questioning. It gives defendants an advantage they would not otherwise have.

One instance where judicial re-ordering may be necessary is when the witness is an expert for one defendant in a multiple defendant case. Allowing a co-defendant to examine last instead of the plaintiff is the equivalent of allowing the presenting attorney two examinations. It permits the remaining defendants to coordinate the examination in a manner that bolsters the defendant presenting the witness.

Making Objections

Another issue that arises in cases with multiple defendants is whether one defendant can object for all defendants in order to avoid the negative impression of "piling on." Piling on is a contrived argument. Allowing defendants to avoid standing up and joining in the objection again immunizes them from the consequences of a choice every litigant must make. The disingenuous claim that this practice avoids the disruption and delay of multiple objections should be rejected. This is another example of defendants working cooperatively behind the scenes but wanting to appear independent in front of the jury. It is a false facade that should not be permitted. If defendants want the advantages of a unified defense, they should be treated as one for all purposes, including the disclosure of a single expert on common liability issues.

Controlling Adverse and Cross Examination

John Henry Wigmore famously said that cross examination is the "greatest legal engine ever invented for the discovery of truth."[8] Yet the effective use of adverse or cross examination depends on both lawyer skill and judicial enforcement. The lawyer must ask narrow questions capable of yes or no answers. He or she must also move to strike non-responsive answers and ask that responses be limited to yes or no when that is appropriate.[9] The most carefully planned and executed examination, however, is useless if the court does not control the witness by striking answers and admonishing the witness. This is especially true when the witness is an expert or a defendant with specialized knowledge or training.

The court should be cautious about instructing the witness to "answer yes or no or say you can't." The "say you can't" option effectively neutralizes altogether the instruction to answer yes or no. Most experts will say they can't, not because the question is incapable of a yes or no answer, but because they want to explain or qualify the answer on their own terms. Any such explanation or qualification should be done on redirect examination and not on the adverse or cross examination itself.

The ability of a lawyer to present her theory of the case and ultimately to persuade often depends on being able to obtain responsive answers to properly framed questions from adverse witnesses. That process in turn is critical to the jury's ability to assess credibility and to weigh conflicting evidence. Few things impact advocacy more than whether and how a court responds to efforts at witness control. The court clearly has discretion to insist on responsive answers as long as it does so even handedly for all parties.[10]

Deciding Motions in Limine

For some time now, a cottage industry has existed of attempting to script and sanitize trials through motions in limine ("MIL"). A book as been written about them.[11] Lawyers make a lot of money preparing them. It is common to see thirty-five to forty motions addressing every phase of the case, from jury selection through closing arguments. Many of these motions are an abuse of process and raise issues that cannot be and were never intended to be decided before trial. How the court handles these motions can influence the fabric of the trial.

The use of MILs is not authorized by statute or rule but has been sanctioned as part of the inherent power of the court to admit and exclude evidence.[12] The limited purpose of a pretrial exclusionary order is to avoid prejudice from specific evidence when that prejudice cannot be avoided by objecting to the evidence at trial. That bears repeating--MILs are intended to prevent prejudice that can only be avoided by ruling before trial on an objection to specific evidence.

In ruling on a MIL, the court must decide preliminarily whether the rules of evidence require exclusion. If they do not, the motion should be denied. If the evidence is inadmissible, however, the court has discretion to grant the motion and bar the evidence before trial or to deny the motion and rule on the objection dur-

ing trial.[13] Reserving the motion for trial is not appropriate. A pretrial exclusionary order is either issued or it is not issued. If it is not issued, the motion should be denied because that is the only relief sought by an MIL. Rulings on MILs are always interlocutory, the motion can be reasserted and the moving party can still object at trial when the evidence is actually offered.

In exercising its discretion, the court should examine and balance the prejudice that waiting for trial would allegedly create against the difficulty of complying with a pretrial order.[14] If the difficulty of complying outweighs the prejudice of waiting, the motion should be denied.[15]

It is clear that MILs should not be used to enforce rules of evidence in a vacuum or without a specific factual target. For example, it is improper to use MILs to bar witnesses, documents or opinions not disclosed under Illinois Supreme Court Rule 213 without identifying the witness, document or opinion.[16] Similarly improper are motions that seek to bar opinions not held to a reasonable degree of medical certainty without specifying the opinion, motions that seek to bar documents protected by privilege without specifying the documents, or motions that seek to prevent comment that a party has failed to call a witness equally available to other parties without identifying the witness. These are routine trial objections that need to be made during trial because a ruling requires context and a complete factual record. Such motions are a waste of time and the filing of them should be sanctioned. They are tantamount to asking for a pretrial order excluding all "irrelevant" evidence.

MILs are also not intended and should not be used to shield counsel from the act of objecting in front of the jury. That is part of trial practice. It is a strategy counsel elects and she should not be immunized from the consequences of it. Illinois Pattern Jury Instruction number 1.01 no longer prohibits the jury from considering the reasons for evidentiary rulings.[17] In fact, the comments specifically note that "rulings on many objections should be considered."[18] This can only be done if the objection occurs in open court. The jury likewise should be able to evaluate the conduct of counsel and that conduct should not occur behind closed doors.

Finally, MILs should not be used to script or program the trial. Trials are supposed to be spontaneous events. That is a good thing. Candor and honesty flow most reliably from unrestrained inquiry. Effective advocacy depends on passion and zeal which are diluted by a pretrial laundry list of do's and don'ts.

The following passage, endorsed in *Bradley v. Caterpillar Tractor Co.*,[19] should be remembered by trial attorneys and trial courts alike:

> "'The motion in limine is a useful tool, but care must be exercised to avoid indiscriminate application of it lest the parties be prevented from even trying to prove their contentions. That a plaintiff may have a thin case or a defendant a tenuous defense is ordinarily insufficient justification for prohibiting such party from trying to establish the contention. Nor should a party ordinarily be required to try a case or defense twice once outside the jury's presence to satisfy the trial court of its sufficiency and then again before the jury. Moreover, the motion in limine is not ordinarily employed to choke off an entire claim or defense. . . . Rather, it is usually used to prohibit mention of some specific matter, such as an inflammatory piece of evidence, until the admissibility of that matter has been shown out of the hearing of the jury. . . .
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> . . . The motion is a drastic one, preventing a party as it does from presenting his evidence in the usual way. Its use should be exceptional rather than general. . . . The motion should be used, if used at all, as a rifle and not as shotgun, pointing out the objectionable material and showing why the material is inadmissible and prejudicial. Since no one knows exactly how a trial will proceed, trial courts would ordinarily be well advised to require an evidentiary hearing on the motion when its validity or invalidity is not manifest from the face of the motion.[20]

Censoring Language

Particularly abusive motions in limine are ones that ask the judge to prohibit a witness from using certain words when answering questions. The challenged words are frequently culled from deposition testimony or reports prepared by the witness during discovery. Examples are efforts to bar "unconscionable," "outrageous," and "hard to believe" in a medical negligence case where the plaintiff's expert was describing the gravity of defendant's deviation from the standard of care. Or to exclude "gold standard" or "best test" or "inexpensive" or "easy to perform" when describing the tests that were available to the defendant physician in diagnosing or treating the illness.

Defendants argue that the only relevant question is whether the doctor deviated from the standard of care and that any characterization of that deviation or the testing options available is "inflammatory" and "irrelevant." Fortunately, the law does not require that cases be tried in a sterile vacuum or that they be stripped of human emotion. Characterizing the gravity of the conduct or the superiority of alternative testing aids the jury in weighing the conflicting evidence and in determining whether negligence occurred. Witnesses should not be required to shed their vigor in the name of prudence. Cross examination has proven to be an effective crucible for excessive fervency.

The judge must guard against an invitation to bar language or to substitute his or her own judgment regarding word choice. The only legal question is whether the challenged words are so inflammatory as to deny an opposing party a fair trial. Short of profani-

ty, it is difficult to imagine words that justify judicial editing. The fact that the language carries emotion or impact is clearly insufficient. Passion for a cause is a good thing. A motion in limine should not be an exercise on the limits of the First Amendment. What words a witness chooses to use in answering a question should rarely be subject to suppression, especially "prepublication" censorship.

Cumulative Evidence

Equally abusive motions are ones that seek to bar "cumulative" or "duplicative" evidence without identifying the evidence or witness that is alleged to be cumulative and without knowing what the evidentiary record is or will be. This is most often directed towards damage evidence (*e.g.,* family photographs or loss of society witnesses) or towards liability evidence (*e.g.,* expert witnesses on the standard of care or proximate cause). Premature and undue restrictions clearly impair advocacy.

Even when specific evidence is identified, defendants often argue that anything more than one is improperly cumulative. That is not the law. The court has discretion in determining the volume of evidence and when evidence becomes inadmissibly duplicative.[21] The test, however, is not whether a fact sought to be proved has already been established by earlier evidence (*e.g.,* whether new witnesses will say the same thing or whether multiple photographs include the same people). In deciding whether evidence is cumulative, the court should consider the burden of proof borne by the party offering the evidence, the nature and extent of the dispute over the issue to which the evidence relates, the closeness of the evidence on the disputed issue, whether different perspectives are provided by the additional evidence and whether the evidence relates to different periods of relevant time.[22]

Erring on the side of admission is prudent because the plaintiff carries a burden of proof, the satisfaction of which is determined later by the jury at deliberations and not by the judge at the time of tender. It is more likely that insufficient evidence will be prejudicial than it is that duplicative evidence will be.

Emotional Outbursts

It is common in catastrophic injury and death cases for defendants to ask the judge to bar displays of emotion on grounds that they would unduly influence or inflame the jury. These motions are especially inappropriate because something as subjective as emotional displays cannot be evaluated before they occur and before context and circumstance are known. Attempting to do so stifles genuine emotions and deprives the jury of relevant facts. Trials involve human tragedy. Witnesses cry and break down. That is not error when it is real and spontaneous and when it is precipitated by and proportional to the evidence. These motions should be summarily denied because inappropriate conduct cannot be defined in advance. It is like pornography in that the court will only know it when it sees it.

The Judicial Imprimatur

The significance of what a judge says or does in front of the jury comes from the perception by the jury that the judge is infallible. The focal point of every courtroom is an elevated bench occupied by a person wearing a black robe. This is literally and symbolically a position of power. Juries recognize this and rely on judges for guidance. Every word and gesture from the bench has the potential to influence opinion.[23]

This potential to influence is not limited to official rulings or instructions but extends to random comments the judge may make in front of the jury. Even seemingly innocuous banter can impact how the jury evaluates evidence. A good illustration of this occurred in *First National Bank of LaGrange v. Lowrey.*[24]

John Lowery, an attorney, was accused of professional negligence in his representation of a minor in an underlying medical malpractice claim relating to Lowery's failure to inform the minor's guardian of a one million dollar pretrial settlement offer. At trial, Steve Lubet, a legal ethics professor, was permitted to offer his opinion that Lowery deviated from the standard of care by failing to abide by certain Rules of Professional Conduct. At the conclusion of Professor Lubet's testimony, the follow exchange occurred in front of the jury:

Court: When did you start at Northwestern?
Witness: 1975
Court: That's when my son was there.
Witness: I taught your son.
Court: I just wanted to make it clear.
Witness: Thank you, Your Honor.
Court: My son's a very ethical lawyer.
Witness: I did my job.[25]

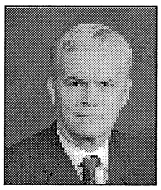
Of course, defense counsel did not object. To do so would only have thrown gasoline on the fire. The damage had been done. By conversing with the witness about irrelevant history the trial court unwittingly but completely validated the witness's credibility in the presence of the jury. There is no way to unring that anthem's bell. The force of a central authority figure can never be ignored. Sometimes, we all forget this fact.

Conclusion

A jury trial is not the failure of our justice system, but rather its apex--its most complete expression. To a judge, it might involve an old case cluttering the docket. To parties and attorneys, it is the culmination of years of time, expectation and financial investment. It is not something just "to get through." It is an opportunity for justice and it should be given room to breath.

Lawyers will always think of creative ways to shape the adversary process in a manner advantageous to their clients. The judicial challenge is to resist the invitation to act when not acting is more appropriate. Ensuring fundamental fairness does not require that a trial be scripted or that it be micro-managed. In fact, justice is best achieved and truth best defined through spontaneity and unrehearsed combat. When judicial action is appropriate, it should be tempered with recognition that action carries consequences and that even routine practices can impact an impressionable jury.

[1] *In re H.S.H.*, 322 Ill. App. 3d 892, 896 (2d Dist. 2001).
[2] *People v Jenkins,* 10 Ill. App. 3d 588, 590 (1st Dist. 1973).
[3] 735 ILL. COMP. STAT. 180/1.
[4] ILL. PATTERN JURY INSTRUCTION (CIVIL) No. 31.09 (3d ed. 1992).
[5] 735 ILL. COMP. STAT. 5/2-1102.
[6] ILL. SUP. CT. R. 233 (134 Ill. 2d R. 233).
[7] *J.L. Simmons v. Firestone Tire & Rubber Co.,* 126 Ill. App. 3d 859 (3d Dist. 1984) (quoting 134 Ill. 2d R. 233).
[8] 5 WIGMORE, EVIDENCE § 1367 (Chadborn Rev. 1794).
[9] See *Lebrecht v Tuli,* 130 Ill. App. 3d 457, 479-81 (4th Dist. 1985).
[10] *See id.*
[11] SCOTT LANE ET AL., ILLINOIS MOTIONS IN LIMINE (2008).
[12] *Department of Pub. Works & Bldgs. v. Roehrig,* 45 Ill. App. 3d 189, 194-95 (5th Dist. 1976); *see also* MICHAEL H. GRAHAM, CLEARY & GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE 41-47 (9th ed. 2009).
[13] *Roehrig,* 45 Ill. App. 3d at 195.
[14] *Id.*
[15] *Id.*
[16] *See* ILL. SUP. CT. R. 213 (210 Ill. 2d R. 213).
[17] *See* ILL. PATTERN JURY INSTRUCTION (CIVIL) No. 1.01 (4th ed. 2000).
[18] ILL. PATTERN JURY INSTRUCTION (CIVIL) No. 1.01, cmt. 3 (4th ed. 2000).
[19] 75 Ill. App. 3d 890 (5th Dist. 1979).
[20] *Bradley v. Caterpillar Tractor Co.,* 75 Ill. App. 3d at 900 (*quoting Lewis v. Buena Vista Mutual Insurance Ass'n,* 183 N.W. 2d 198, 200-01 (Iowa 1971)); *see also* MICHAEL H. GRAHAM, CLEARY & GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE 46-47 (9th ed. 2009).
[21] *Dillon v. Evanston Hosp.,* 199 Ill. 2d. 483, 495 (2002).
[22] *See Maffett v. Bliss,* 329 Ill. App. 3d 562, 572-73 (4th Dist. 2002); *Hunt v. Harrison,* 303 Ill. App. 3d 54, 57-58 (1st Dist. 1999); *Hubbard v. Sherman Hospital,* 292 Ill. App. 3d 148, 155 (2d Dist. 1997; *Moore v. Anchor Org. for Health Maint.,* 284 Ill. App. 3d 874, 881 (1st Dist. 1996).
[23] *See People v Terrell,* 185 Ill. 2d 467, 487 (1998); *People v Rush,* 250 Ill. App. 3d 530, 536 (1st Dist. 1993).
[24] 375 Ill. App. 3d 181 (2007).
[25] *First National Bank of LaGrange v. Lowrey,* 375 Ill. App. 3d 181, 212 (2007).



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