

10 Practical Tips for Trial Attorneys: A Conversation with Judge James L. Kimbler (Retired)

©Copyright James L. Kimbler 2017

Why This Book?

- I love conducting trials
- Jury trials are democracy in action
- But jury trials need trial lawyers
- Speak for the voiceless
- Believe that I can help trial lawyers

Focus on Pre-Trial Tips

- The book has 16 chapters covering 28 tips
- Not going to cover all of them
- Focus on some of the Pre-Trial Tips in the book.

Tip No. 1: Know Your Judge

- Interaction with judge starts long before the jury is summoned
- The umpire/judge analogy
- Like umpires judges make discretionary calls
- Not usually reason for reversal
- So it is important to know your judge

Get the “Book” on the Judge

- What does the judge like during trials?
- Is the judge technical or loose on the rules of evidence?
- Speaking objections allowed or prohibited?
- Wants trial briefs?
- Settlement conference before trial?

Learning the Book

- Finding the “book” on a judge:
- Other lawyers
- Court staff
- Asking the judge
- Online discussion groups for attorneys

Tip No. 2: Know Your County

- Ohio has 88 counties
- They are often very unique
- Same metropolitan area, different results
- Jury verdicts can be much different

Do Research on the County

- Know verdict trends in that county
- Find out from lawyers
- Find out from judicial support staff
- Find out from judges
- Know voting history of county
- Know demographics

Demographic Research

- Census Bureau Website: www.census.gov
- Has a tool called: American FactFinder
- Demographic information
- Example of Medina County

Medina County

- 2010 Population: 172,332
- Median Age: 41.4
- Median Income: \$66,952
- Education: 93.5% High School or better
- Racial make-up: 98.9% White

Tip No. 3: Know Your Narrative

- Humans are storytellers
- Have been telling stories ever since we formed societies
- Stories explain things observed
- Stories make sense out of facts

Trials are Stories

- Jury is receiving new information
- Will try to make sense of this new information
- Will be tempted to put this new information into a narrative, a story

Narrative Sources

- Three sources for a narrative:
- You
- Your Opponent
- The jury itself
- Two of those are problematic for you

Elements are not the Story

- Causes of Action have elements
- Trained to think in terms of elements
- Elements are part of the story
- They are not the story
- The story is the human element

Malpractice Verdicts

- Hard to get verdicts for plaintiffs in Medina County in malpractice cases
- Only had two plaintiff verdicts
- One involved a doctor cover up
- Other involved a hospital not following its own rules

Easy for Jury to Understand

- Hard to understand medical terms and procedures
- Easier to understand a doctor covering up her negligence
- Easier to understand a hospital not following its own rules

Look for the Human Impact

- How did the breach of contract impact your clients emotionally and financially?
- How did the car accident change your client's life?
- How did the landlord's acts affect your client's family?

Tip No. 4: Be Courteous to Judicial Staff

- Judges see support staff everyday
- Tend to be protective of support staff
- Lawyers who are rude to support staff will get talked about
- Lawyers who are courteous to support staff will get talked about

Important Facts about Humans

- People like people who make their jobs easier
- People don't like people who make their jobs harder
- Judicial support staff are people

Jobs Made Harder

- Demanding that your case be moved up without giving a good reason
- Trying to back door the support staff by going directly to the judge
- Not observing the procedure in that courtroom
- Being arrogant and/or rude

Jobs Made Easier

- Understanding their loyalty is to the judge who appoints them
- Understanding that there are others demanding their time/attention
- Understanding the procedures used in that courtroom.

Tip No. 5: Keep Credibility with Trial Judge

- Trial judges and umpires both make quick decisions
- Rulings on evidence are usually made quickly
- It is critical that judge respects your abilities

Two Attorneys Example

- Two attorneys are trying a case
- I know that one knows the rules of evidence
- I know that the other does not
- Whose objection will get more consideration?

How do you get respect?

- By knowing the rules
- Both Ohio Rules of Evidence and Ohio Rules of Civil Procedure
- By knowing local rules
- By being on time
- By being professional

Tip No. 6: Know the Law

- This may seem obvious
- But it is critical
- When you start drafting a pleading make sure you know the elements of the cause of action
- Go to Lexis or Westlaw and find out the elements of each cause of action you are litigating

Why So Important?

- Avoid situation where you are dismissed out of court on failure to state a claim
- Begin to build your evidence
- Begin to build your narrative
- Realize what is relevant and not relevant to the case

Tip No. 7: Know the Law of Damages

- This is an area where lawyers sometimes make mistakes
- While there are general rules that apply to all appellate districts there are other rules of law that are district specific
- One that comes to mind is the law on damages to residential real estate
- Diminution or cost of repair?

Tip No. 8: Know The Courtroom

- Know the layout of the courtroom
- Know the technology available to attorneys and litigants
- If not familiar with the technology make sure you get lessons or have someone who knows help you.

Not the Court's Staff Job

- It is not the court's staff's job to run the technology for you
- Not their job to train you the day of trial
- Not their job to make sure that you have proper equipment
- **That is your job!**

Tip No. 9: The Risk of the Unknown

- Both sides in a lawsuit run two common risks
- One is what the jury will do
- The other is what the judge will do
- The second is probably more predictable than the first
- More information about judges and far fewer of them than jurors

Evaluate the Risk Correctly

- Settlement can avoid both of those risks
- But only if both sides are evaluating the risk correctly
- If one side or the other is not then settlement becomes much more unlikely
- You must know how jury verdicts are going for your type of case in the case's venue

How to Evaluate the Risk

- Talk to other attorneys
- Talk to court staff
- Ask the judge questions about verdicts when he/she is conducting a pre-trial conference
- Do online research
- If the case is big enough do focus groups with people with similar demographics to jury

No Risk, No Pressure

- If rejection of your offer/demand poses no risk to the other side, there is no pressure to settle
- No pressure to settle, then no reason to settle
- If the other side believes that the jury will not return a verdict close to your settlement/demand no reason to settle
- They don't settle because it helps your client
- They settle when it helps their client.

Tip No. 10: Questions Before Trial

- Does the judge allow jury to ask questions?
- Does the judge allow the jury to take notes?
- Will there be a final pretrial or settlement conference?
- Does the judge want lawyers to submit jury instructions?

Questions-2

- Does the judge allow lawyers to read from instructions during closing argument?
- Will each juror be given a copy of the instructions?
- Will a copy of the instructions be sent back with the jury?

Questions-3

- How does the judge handle jury selection?
- Are you allowed to question the whole panel or just the first eight or 12?
- How are challenges handled?
- Does the judge use a strike method?
- How are alternates handled?

Final Thoughts

- Take pride in being a trial lawyer
- Take pride in helping courts do justice
- Take pride in your role in the process
- Not going to win them all, but all of them deserve your commitment and hard work
