

Trial ethics: Don't risk your soul to win a point

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**EIGHTEENTH ANNUAL STATEWIDE
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“We operate under a jury system in this country, and as much as we complain about it, we have to admit that we know of no better system, except possibly flipping a coin.”

~ Dave Barry

Witnesses

Encouraging a witness to be unavailable

Rule 5-310, Prohibited Contact With Witnesses

A member shall not:

(A) Advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein ...

Encouraging a witness to be unavailable

- * *Tuttle v. Combined Ins. Co.* (E.D.Cal. 2004)
222 F.R.D. 424, 427
- * Review Department of the State Bar Court, March 15, 1999,
4 Cal. State Bar Ct. Rptr. 23

Compensating witnesses

Rule 5-310, Prohibited Contact With Witnesses

A member shall not:

...

(B) Directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a member may advance, guarantee, or acquiesce in the payment of:

- (1) Expenses reasonably incurred by a witness in attending or testifying.
- (2) Reasonable compensation to a witness for loss of time in attending or testifying.
- (3) A reasonable fee for the professional services of an expert witness.

Compensating witnesses

Cal. State Bar Formal Opn. No. 1997-149

Attorney may compensate a non-expert witness for the witness's time spent preparing for a deposition or a trial. However, Attorney must comply with Rule 5-310(B). Compensation must be reasonable in light of all the circumstances. Compensation cannot be contingent on the witness's testimony, nor on the outcome of the matter.

Evidence

"The United States wins its point whenever justice is done its citizens in the courts."

~ Solicitor General Frederick Lehmann
(Taft Administration)

The suppression of evidence

Rule 5-220, Suppression of Evidence

A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce.

The suppression of evidence

* *Brady v. Maryland* (1963) 373 U.S. 83

* “When prosecutors act dishonestly or unilaterally decide that evidence favorable to the defense should be withheld, the accused is endangered, the case is damaged and public confidence is lost.”

- Review Department of the State Bar Court

Discrimination in jury selection

“Ending racial discrimination in jury selection can be accomplished only by eliminating peremptory challenges entirely.”

~Thurgood Marshall

Discrimination in jury selection

The "Wheeler/Batson" rule prohibits the use of peremptory challenges in jury selection based on an attorney's belief that prospective jurors may be biased because they are a member of a certain racial, ethnic, or religious group. Also applies to gender and sexual orientation.

* *People v. Wheeler* (1978) 22 Cal.3d 258

* *Batson v. Kentucky* (1986) 476 U.S. 79

* California Code of Civil Procedure §231.5

Lawyers behaving badly

Max: My dad? He's... A liar.

Teacher: A liar? I'm sure you don't mean a liar.

Max : Well, he wears a suit and goes to court and talks to the judge.

Teacher: Oh, you mean he's a *lawyer*.

~ Liar Liar (1997)

Attorneys behaving badly during trial

Hawk v. Superior Court (1974)
42 Cal.App.3d 108, 114

Attorney contempt upheld for:

- * advising his client to disobey a court order
- * misconduct during voir dire
- * referring to client by his first name and making reference to friendship with client
- * stating that the defendant was stripped of his presumption of innocence by the press with the help of the sheriff's office
- * humiliating a witness
- * repeating questions after an objection had been sustained
- * telling the jury that the prosecutor had a reasonable doubt as to the defendant's guilt
- * improperly impeaching a witness
- * displaying an offensive personality
- * failing to yield respectfully to the rulings of the court

Perjury

“A false witness shall not be unpunished, and he that speaketh lies shall not escape.” ~ Proverbs 19:5

“If you commit perjury in a so-called first-degree murder case, and you're caught red-handed for the entire world to see, and you get only a \$200 fine, what kind of message does that send about lying in our courts?”

~ Johnnie Cochran

Perjury

Rule 5-200, Trial Conduct

In presenting a matter to a tribunal, a member:

- (A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;
- (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law; ...

Client perjury

* *People v. Jennings* (1999) 70 Cal.App.4th 899

* Cal. State Bar Formal Opn. No. 1983-74

Attorney who learns of client's testimonial perjury is obligated to pursue remedial action promptly. Absent a correction by the client, Attorney must move to withdraw (without disclosing client confidences or secrets); if the court does not permit withdrawal, Attorney is precluded from relying on the perjured testimony.

* Orange County Bar Association Formal Opn. No. 2003-01

Attorney perjury

* *In re Aguilar* (2004) 34 Cal.4th 386

* *Segretti v. State Bar of California* (1976) 15 Cal.3d 878, 888

“A member of the bar should not under any circumstances attempt to deceive another.”

* *Medoff v. State Bar of California* (1969) 71 Cal.2d 535

Press at trial



Trial publicity

Rule 5-120, Trial Publicity

(A) A member who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter...

Trial publicity

Rule 5-120, Trial Publicity

... (C) Notwithstanding paragraph (A), a member may make a statement that a reasonable member would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the member or the member's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Closing argument

“[F]inal argument has increasingly turned into a quagmire of personal character attacks, impermissible reference to non-record evidence, and blatant pleas to jurors’ sympathies and prejudices” ... “the final argument of a trial is often viewed as a legal battleground in which almost anything goes.”

~ Bradley R. Johnson, *Closing Argument: Boom to the Skilled, Bust to the Overzealous*, Fla. B. J., May 1995, at 12

Closing argument

People v. Love (1961) 56 Cal.2d 720

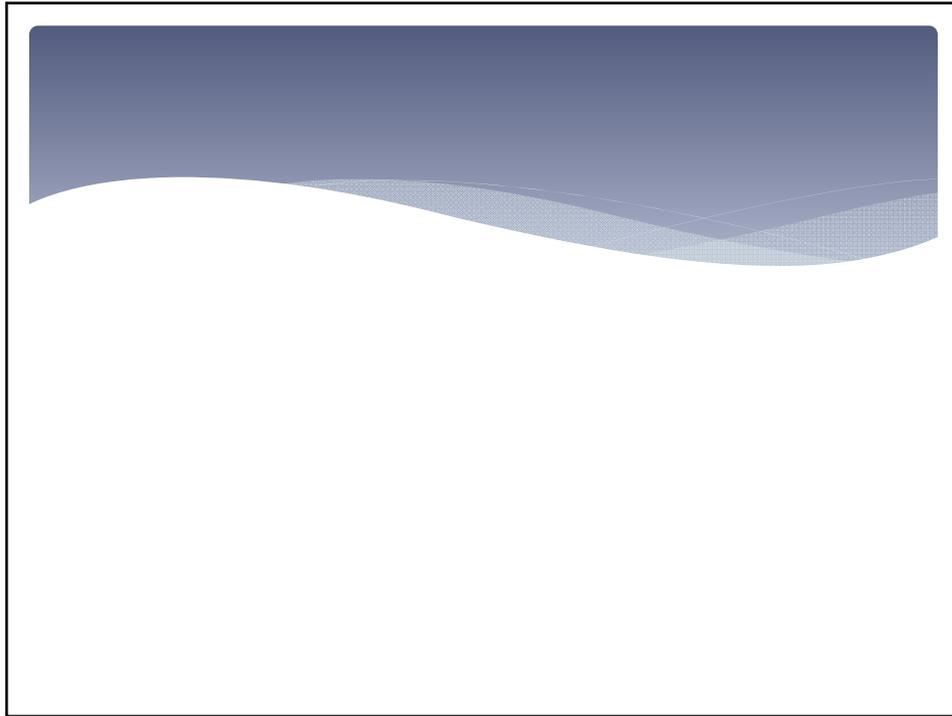
Judgment imposing the death penalty and order denying a new trial on the question of penalty were reversed and remanded based on improper summation by prosecutor:

- * "Counsel's summation to the jury "must be based solely upon those matters of fact of which evidence has already been introduced or of which no evidence need ever be introduced because of their notoriety as judicially noticed facts.""
- * "[Counsel] may state matters not in evidence that are common knowledge, or are illustrations drawn from common experience, history, or literature..."
- * "[Counsel] may not, however, under the guise of argument, assert as facts matters not in evidence or excluded because inadmissible..."
- * "[Counsel] may not use evidence offered for a special purpose, such as credibility or state of mind, to argue inferences for which the evidence is inadmissible..."
- * "[A]nd [counsel] may not argue his own belief of guilt based upon evidence not produced in court..."
- * "Moreover, counsel may not use arguments calculated to mislead the jury ... or that appeal primarily to passion or prejudice..."

Jurors

"...I was under the impression that we'd already purchased ourselves a verdict."

~ Runaway Jury (2003)



Improper contact with jurors

Rule 5-320, Contact With Jurors

- (A) A member connected with a case shall not communicate directly or indirectly with anyone the member knows to be a member of the venire from which the jury will be selected for trial of that case.
- (B) During trial a member connected with the case shall not communicate directly or indirectly with any juror.
- (C) During trial a member who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the member knows is a juror in the case.
- (D) After discharge of the jury from further consideration of a case a member shall not ask questions of or make comments to a member of that jury that are intended to harass or embarrass the juror or to influence the juror's actions in future jury service.
- (E) A member shall not directly or indirectly conduct an out of court investigation of a person who is either a member of the venire or a juror in a manner likely to influence the state of mind of such person in connection with present or future jury service.
- ...
- (G) A member shall reveal promptly to the court improper conduct by a person who is either a member of a venire or a juror, or by another toward a person who is either a member of a venire or a juror or a member of his or her family, of which the member has knowledge.

Technology in the courtroom

Use of social media to research potential jurors

- * New York State Bar Association Committee on Professional Ethics, Formal Opinion No. 2012-2

If an attorney's use of social media to research a prospective juror results in an inadvertent notification or communication to the prospective juror, such conduct might constitute a prohibited communication.

Use of social media to monitor empaneled jurors

- * *Juror Number One v. Superior Court* (2012) 206 Cal.App.4th 854, 855

Juror posted items to Facebook during criminal trial; the court ordered the juror to authorize the court to access the juror's Facebook account. The juror challenged the court's order. The Supreme Court determined that the juror had no expectation of privacy and that juror's privacy rights do not trump the defendant's right to a fair trial.

Closing thoughts