JUDGES SPEAK OUT

By Michael L. Weiner

[Editor's Note: *The Bench and Bar obviously share a common goal, namely the efficient and fair resolution of disputes. Unfortunately, judges seldom have the opportunity to provide suggestions and constructive criticism to the attorneys appearing before them. With this in mind, Mike Weiner recently had lunch with four experienced and highly respected district court judges in order to obtain their perspective on how we can better serve our clients. Participating in the following edited discussion were Hennepin County District Judge Patrick Fitzgerald, Ramsey County District Judge Paulette Flynn, United States Magistrate Judge (formerly Hennepin County District Court Judge) Ann Montgomery and Anoka County District Judge James Morrow. The following is an edited transcript of that discussion.*]

CANDOR AND CIVILITY OF ATTORNEYS

MR. WEINER: What areas would you see as recurring kind of problems that you have some suggestions how to avoid or how to improve.

JUDGE FLYNN: I think for all of the lawyers that I see there is no substitute for preparation, that would be my biggest thing, and for lawyers to also know that we need to rely on their reputation for candor. I want to be able to have lawyers before me who I can trust, and for the most part I do. But I do think that the lawyers need to be aware of that situation as well as preparation.

JUDGE FITZGERALD: One thing I have now directed my law clerk to do in every memorandum that comes in in front of me is to shephardize the cases that have been cited. I just had a major railroad case wherein they cited a case to me that I happened to be somewhat familiar with, and lo and behold the case had been cited and it had been somewhat modified, and none of that was called to my attention. That really does not demur to the benefit of counsel. I'm not going to say it's deliberate because I don't think I can justifiably say that. But it does raise concerns on the part of trial court judges when we are subjected to an incident of that type.

When that occurred with me, I figured from then on out every case that is of major import to me I want to make sure my law clerk shepardizes it so that we don't get misled.

JUDGE MORROW: You remember that attorney's name too. That's unusual, I think, hopefully. When attorneys aren't candid with the court, it goes against the Rules of Professional Responsibility. If they aren't, you remember their name and it will always be with you.

JUDGE FITZGERALD: I'm don't want to mislead anybody. I'm not going to say that he deliberately misled the court because I don't think he did. What I think he did was perhaps didn't read the case quite as appropriately as he should have.

JUDGE MORROW: Or his brief.

JUDGE FITZGERALD: Or the brief, nor did he then shepardize his case to give the court the benefit of some of the modifications that were very apropos.

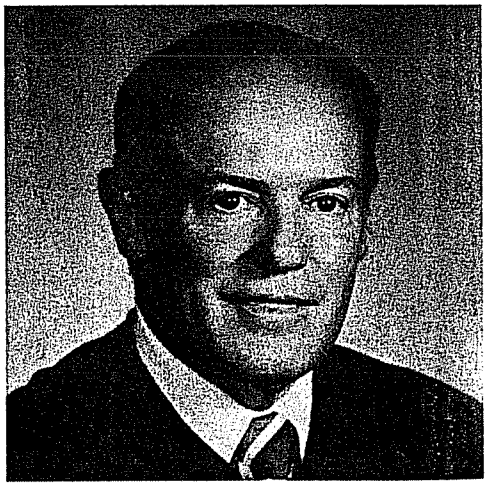
JUDGE FLYNN: In the family court area, one thing I am noticing is that they are relying on their own, on the lawyers' arguments, and they are not supported by affidavits. I think they know their cases so well that they kind of forget to have an affidavit backing it up, and you need that. A lot of Rule 53s are granted on that basis.

MR. WEINER: Are you finding that candor or lack of candor is a growing problem or a lessening problem.

JUDGE MORROW: I don't see it as a big problem. In family court it's so hard, it's such a hard, difficult court for the attorneys and the judge and of course especially the litigants. I think the attorneys have a hard time controlling their clients, and there may actually be a little more of that in family court. But I don't see it as a big problem. When it happens, it's huge as far as the attorney's reputation.

JUDGE FLYNN: What I am seeing is they will have a marital termination agreement and then it's submitted to me for findings, and they have added things

MAGISTRATE JUDGE MONTGOMERY



JUDGE PATRICK FITZGERALD

or deleted things.

JUDGE MORROW: Courtesy wise you treat the judge — attorneys are like overly solicitous of the judge. I use the example of it's like Eddie Haskell and Mrs. Cleaver and how wonderful she looks and how well she is dressed. But on the other hand, if they treat the court clerks with disrespect or they are arrogant, we hear about it. It makes sense to not only be courteous to the judges and the law clerks and so forth but to the court personnel because we hear about it, the judges hear about it all the time. The attorney comes in, I'm from such and such a firm and I expect to be treated — to be given priority. It's a real big problem. Attorneys can be very demanding and very arrogant with staff.

JUDGE FITZGERALD: That's just beyond my comprehension that any trial lawyer would engage in that kind of activity, realizing the potential consequences that could develop as a result of that. Judges are very close to our clerks, we are very, very close to our court reporters and we are also close to all personnel in the courtroom facilities. We expect them to treat attorneys and litigants and people in a courteous and appropriate and a proper manner, and they better get the same treatment from everyone, otherwise we will govern our actions accordingly too. I don't think it's too much of a problem with lawyers. I haven't seen that.

MR. WEINER: Are you finding, with all of the talk about the lack of civility among lawyers these days, that it's showing up in your courtrooms. Has there been any significant changes?

JUDGE MORROW: I think it's gotten better at least in terms of jury trials and motions. I hear it's still — attorneys tell me on the side that when the court is not there, –it still gets kind of bad.

JUDGE FLYNN: I think in family court there is a difference in the civility level, and I think in part it's because their clients want them to be.

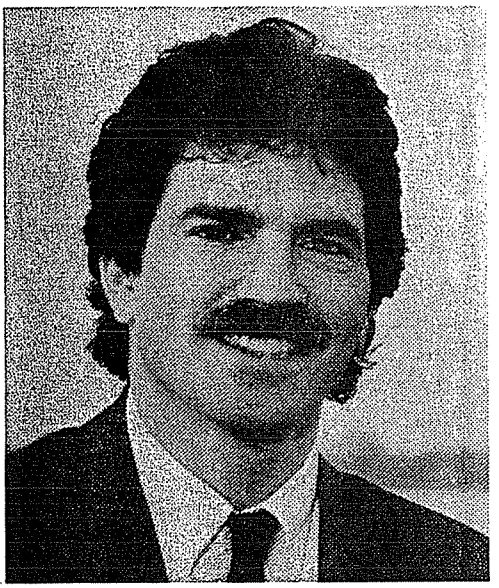
JUDGE MORROW: Beat up people.

JUDGE FLYNN: Yes. So I think they are doing what their client wants to see, whereas it may not be impressive to the judge.

JUDGE MORROW: Again, I think the overwhelming majority of really good family attorneys are smart enough not to do that because they know that it's not going to help them with the judge if they are beating the hell out of somebody on the other side.

JUDGE FLYNN: Right. I kind of feel sorry for them a little bit when they have to put on a show for the client.

JUDGE FITZGERALD: The proliferation of all of this stuff that you see in the movies and on television generates some of that showmanship that clients to a certain degree expect. I think it's the responsibility of the court system and the judges and everybody connected with it, and I tell juries and I tell lawyers believe me, members of the jury, whatever you see on television by way of these law shows, whatever you see in the movies by way of shows about lawsuits like the movie The Verdict and things of that nature, I said those people are in the entertainment business. We are not. We are here for the orderly administration of justice, and I can assure you there will be none of that as this case is in the process of being tried. I think lawyers have to know that too. It puts lawyers in a position where they feel in a certain respect that they have got to live up to those standards because that's what unfortunately lay people think our system is all about. Now you can imagine what it will be like a California.



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we read the cases.

In Anoka County we don't have the block system, we have a master calendar. We have a 30-day assignment where we can pick up several summary judgment motions every day for 30 days. We don't have time then to do them. We don't have referees like they do in Ramsey and Hennepin County. So we need to decide 80 or 90 percent of these cases right away. So we have to read the briefs, the reply briefs and make a decision that day unless we are going to be buried.

One of the most frustrating things is to have an attorney come up in the afternoon and hand you a big, thick brief or come in that morning and expect you to hear the oral argument and then read the brief later or take everybody else's time and read the brief while other attorneys are waiting. That's real frustrating.

On the flip side is if you spend hours reading briefs and then the attorneys call the morning of the motion and say, gee, Judge, we settled this and or we continued it. That may not be that big of deal on the block system but in the master calendar system we wasted all of that time. The attorneys who I really appreciate are the ones who call a day or two ahead of time so we don't have to spend all that time on the file.

JUDGE MONTGOMERY: I really appreciate a plaintiff's attorney or defense attorney for that matter that has really spent some time focusing the brief for the submissions and getting them down to what couple of issues are significant in the matter, not just go to the brief and memo bank and have their word processor kick out five or six pages from some other submission some time earlier.

It doesn't take too long of reading those briefs to figure out what's a canned product and what was tailor-made for this case with some thought, shorter briefs that are to the point and are really focused in on. I don't need string cites of a lot of things on many motions. If there's one or two controlling cases, I would like those to be pointed out to me clearly and have them there.

Just another little tip, it's getting so hard to find a lot of these unpublished decisions that if there's an unpublished decision that's important, I would like to have a xerox copy of that attached right to the brief so I don't have to search around for it.

TRIAL PRACTICE

JUDGE MORROW: The other biggest annoyance I have is in trial. I tell the attorneys very clearly that in the Minnesota Civil Trial book there is basically only two things you can do after you pick a jury, that's ask a question and make an objection with a legal basis, a two- or three-word legal basis. Anything else under the rules is not proper.

So attorneys playing games in front of the jury is one of the things that I really think hurts the attorneys and it hurts their credibility in the court, it hurts their credibility with the jury. Most of the attorneys are pretty good about it.

The other thing is you rarely see a trial memo, and those are really appreciated. The good attorneys, the really good trial attorneys have trial memos when there is an unusual issue in the law or an evidentiary issue. Unusual means does the judge know that area of the law.

In Anoka County and most of the counties in the state we do family, we do probate, we do civil, all kinds of criminal, we do juvenile. It's appreciated when the attorneys come in, and it doesn't have to be complicated, but a short trial memo saying, Judge, here's the legal issues that you may have to deal with and here's all of the evidentiary issues that are going to be hot. It doesn't make sense to bring up a hot evidentiary issue when you are in trial.

The court should have the chance to prepare and research and make the right decision. I think most judges want to make the right decision, and we can do that if we get a trial memo ahead of time.

JUDGE FITZGERALD: I had two matters recently, I would say within the last year and a half, that were almost mind-boggling to me. One was a court case and one was a jury case.

In the court case they had the witness on the stand, and it involved the interpretation of what a contract meant, so they had the original contract offered into evidence. That was utilized by the witness on the stand. The opposing counsel gave a copy of the contract to the other lawyer and gave none to the court.

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I couldn't believe that. I sat there for a couple of minutes thinking perhaps the lawyer would pick up on it. Lo and behold, he did not. So finally I said to him, sir, this is a matter to be tried by the court. There isn't anybody more important in this courtroom that should be given a copy of that document than the trial court judge.

He said, "Oh, Judge." He shuffled around. He didn't have an extra copy for me. He had to work with the co-counsel on the copy that they had for them so that I could be furnished a copy, that kind of lack of preparation and that kind of lack of foresight.

It happened also in a civil case where they were distributing copies of exhibits to everybody other than the trial court.

JUDGE MORROW: It's pretty elementary, it's pretty common sense. Again, the good attorneys will often have all of the exhibits premarked, they will have a binder and a notebook, and especially if it's a court trial, they will have one for the court. If the law clerk is sitting in, one for the law clerk and the attorneys and so forth.

JUDGE MONTGOMERY: I think generally plaintiffs' attorneys are better than defense attorneys in terms of understanding the importance of physical exhibits to the jury. They tend to build their case around them and sometimes I think go to maybe unnecessary expense with nice exhibits. A lot of us, myself included, are visual learners that like to see it more than just hear it.

But I think sometimes plaintiffs' attorneys overlook the fact that the judge needs to be educated too, not only at trial but sometimes at motions. It's real helpful to have an exhibit there that shows how something happened or that diagrams in some way so that those of us that tend to learn visually can see it. I think that is a technique of arguing motions and rulings and is often overlooked.

JUDGE FLYNN: I agree, and it's very effective too. I can remember the cases where I have had demonstrative exhibits.

JUDGE MORROW: For people that are supposed to be experts in persuasion, you would think they would want to persuade the trial judge at motions the way they do at trials as well. In court trials, of course the same thing for the court trials. You don't see as many exhibits.

JUDGE MONTGOMERY: They are really in need of more in court trials.

JUDGE MORROW: You have one fact finder who is taking notes and trying to listen to people, whereas a jury hopefully will pick up everything that's said. We often don't.

JUDGE FITZGERALD: One of the things that I see and perceive is this: In this day and age, the lawyers are coming in trying civil litigation in front of the courts. They are incredibly well prepared generally and they know what that file is all about. They put that witness on the stand and they zero in on evidence. They are focused on that witness, they have got their list of questions and they go through them, boom. The jury over here is ignored.

We in my age group, I don't think have the technical skills that the lawyers do now but we knew a lot more about people.

JUDGE MORROW: Let me go back to trial and pick up with what Judge Fitzgerald said. I had a lot of court trials

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and a court trial worth several hundred thousand dollars. The main witness for one side was on the stand for hours, a court trial. Never once did the attorney — I saw this profile for several hours. Never once did that attorney, who was a very good attorney, very well prepared, have this key witness turn to me and look at me in the eye and communicate with me and persuade me, which is obviously very important. That's an example.

One of the things that I didn't say which is another pet peeve of mine is first of all, the Minnesota Civil Trial Book is what I base the civil trials on and even criminal trials. It's two or three pages long as far as what you do in the courtroom during the trial. If you read it, every time you will do a lot better job in most cases.

One of the particular things that I think is irritating is when the attorneys fail to control their clients, especially in family court court trials but often in front of jurors. You make a ruling, there is a decision, or a witness is up on the stand and the witness and the parties are back there crying, not usually crying but they are laughing or making faces or groaning. All of those things are inappropriate under the rules under the Minnesota Civil Trial Book, and it hurts your credibility with the court and with the jury. It's not smart.

JUDGE FITZGERALD: I guess I don't have that problem.

JUDGE FLYNN: I haven't seen that, at least with the clients. I've seen lawyers rolling their eyes.

JUDGE FITZGERALD: Not very often.

JUDGE MORROW: Well, it's not very smart.

JUDGE FITZGERALD: I agree with that completely. It's very unwise to do so, and if it happens in front of me, all hell is going to break loose.

JUDGE MORROW: The other thing in trials, it's a trial advocacy issue, but when it gets close to break time or lunchtime or quitting time and you have a jury or even a judge and you are questioning witnesses and the judge says, counsel, any redirect or recross. And they will say a couple of questions, a few questions, and they go on and they go on and they go on. They are probably good questions, they should be asked. But the jury is sitting there counting the questions instead of listening to the answers that are very good answers that would help your case.

So just say yes when the judge asks you. Even if the judge is pressing you with his or her tone of voice, you say yes. You don't say a couple of questions or a few questions.

JUDGE FLYNN: Another tip is I like to give the jury written instructions, and maybe most judges do give written instructions. What just drives me crazy is I've got the jury coming back at nine, and about ten to nine and the attorney comes in and has thought about it further over the evening hours and has come up with some more gems that he wants to insert. Sometimes they are great ideas and really ought to be put into the instructions but then we have got a jury who is unhappy and has to sit and wait for a half hour or so while we make sure that we get them into the instructions. That's where I lose it.

SETTLEMENTS--PREPARATION AND OBLIGATIONS TO CLIENT

JUDGE MONTGOMERY: Going back to more serious matters, the issue of candor and this maybe falls more in the pet peeve category but relevant to your audience. I find really frustrating in my practice on the bench to have situations where I am questioning whether or not the plaintiffs' attorney is representing themselves or their clients.

And particularly to put this into focus, I've had settlement conferences where I think what is a fairly reasonable settlement offer has been made, and plaintiffs' attorneys will tell me they have never heard that before, this is the first time an offer has been made and then to have plaintiffs' attorneys tell me that it definitely won't settle the case or that it's totally out of line without first consulting with their client and giving it some dignity. I understand it's a joint decision that has to be made, but plaintiffs' attorneys hear that offer and tell me that that isn't close or it's laughable without any consultation with their client.

Admittedly it may be a bit of a charade to go out there and talk to your client in the courtroom or sit down and discuss it but I think it's really unfair to sit there in front of the judge and say what the case will or won't settle for without some consultation

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with your client, particularly if an offer has never been made before. I think plaintiffs' attorneys should clearly remember who it is that makes the ultimate decision on it.

It's particularly frustrating in cases that have been over papered by motion after motion. It's disgusting from the plaintiff's point of view too to have cases where the offer would have settled the case a long time before but because of the ensuing costs of preparing a case for trial, it won't. Setting aside those issues which are important, I still think it's very important for the plaintiffs' attorneys to understand that they are representing a client, and it's the clients' decision on settlement.

JUDGE FITZGERALD: I think Judge Montgomery's position is well taken, and I would like to underscore a specific area of the law that generates that problem, and that's employment cases. What really determines the settlement of an employment case or a discrimination type case in this day and age? Is it the issue of attorneys' fees? I'm becoming of the mind-set that maybe that has a lot more to do with that type of litigation than the actual award that's eventually going to inure to the benefit of the plaintiff.

To call your attention to an example, in a settlement conference I was advised that the settlement demand was $90,000 and that the breakdown was 60,000 in attorneys' fees and 30,000 for the party that was allegedly discriminated against. The end result of the conversation after a lot of negotiations was this: Judge, we might be able to work with 90,000; however, the 60,000 is solid as far as the attorneys' fees are concerned. Perhaps we can do something with the 30,000 that is to inure to the benefit of the client, perhaps somewhere in the neighborhood of $15,000. That kind of a scenario of events is of major concern I think to the bench, and it should be to the trial bar because we are seeing a lot of that.

I'm not dumping all of this on the people that are bringing those claims on behalf of these people. I also am of the mind-set that there might also be some of that problem that exists from a defense standpoint because generally the defendant in this type of litigation is a client that can well afford the necessity of an attorney, and sometimes they don't come in in just one but they come in in twos and threes representing them, even on motions. That's frankly a major concern.

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MR. WEINER: On the question of settlement and expectations, are you finding it is more a matter of the attorneys having unreasonable expectations or more of a matter of clients for various reasons having unreasonable expectations, and what suggestions would you have in dealing with both.

JUDGE MORROW: As someone who didn't practice that kind of law but has seen some of those things, I think the attorney is the one that's responsible. He or she is the one that raises the expectations in their client of what the case is worth. I think the defense bar do so many trials they have a pretty good idea what the case is worth. The plaintiffs' attorneys who are specialists, real specialists, usually value the cases and do a good job of it.

It's the attorneys who do other things and are not as experienced or just aren't as good trial attorneys or specialists in this area. They come in and they have unreasonable demands and they get zeroed out, zeroed out again and again and again. They just don't know the value of their case and they don't have control of their client. I don't know if there is a mechanism where they can talk to experienced plaintiff specialists who can tell them what it is worth. They just don't know what the case is worth.

JUDGE FITZGERALD: I would like to add an appendage to what he just said. When is the last time you saw a huge newspaper article about somebody getting a defendant's verdict in a major piece of civil litigation? You'll never read about that, never. But you will see the four million and the six million and the two million and the twelve million and the five billion-dollar verdicts, you see that plastered all over every which direction. Don't think that doesn't affect the thinking of the plaintiffs in all aspects of different types of litigation, it does. I will give you an example. I tried a case against a corporate defendant, a major corporation. I submitted everything. The damage award was a million three. It was audited by the guy from WCCO TV. He came to me and he said I want you to listen, Judge, to my news report on this verdict on this case. He read if off to me and he said what do you think of it. I couldn't comment one way or the other because I think it's inappropriate to do so because there will be additional motions in front of me. But before you go forth with your story, I suggest you call the lawyers. I will give you their names and numbers and I will have the clerk do that for you. He called the lawyers, and it turned out it was a defendant's verdict. He came in to see me a couple of days later and he said thanks, Judge. I called those lawyers, and if I didn't, I would have lost my job. The interesting thing about that is if the verdict would have been against this corporate defendant, it would have been a big splash. As it turned out, I watched the news that night and not a word about the fact that it was a defendant's verdict. That's a classic example of what they do.

JUDGE MORROW: It's not newsworthy. Up in our system we don't have blocks, and so we don't have as much incentive to settle cases. I frankly would rather be trying a civil jury trial than most anything. But I do try to settle them. It just happens so much with these plaintiffs that are probably from small firms maybe or single practitioners. I don't have anything to suggest except when I'm telling them similar cases that have been zeroed out in trying to settle it, it's like they don't believe me or they are going to be different. I don't think they understand how good the defense attorneys are they are going up against. I don't have a suggestion except it's just a problem.

JUDGE MONTGOMERY: I think clearly a lot of plaintiffs' expectations are heightened by publicity, and therein lies a problem.

It's often been interesting to me that there are finance and commerce reports, appellant decisions and lots of different information but there is no section that covers the jury verdicts for the last week, which I have often thought would be good and I would like to have as a judge. All I can tell a plaintiff's attorney in a settlement conference is here is the history heard up on the 16th floor of the Government Center where I know how verdicts come out, and in the last 15 civil cases that have been tried, there have been three recoveries or whatever. So I have to do fairly localized small sample statistics to meaningfully communicate that information.

You asked earlier about what tip could be given the plaintiffs' attorneys or what might they do in that regard. The one thing that I have found helpful is you have cases that can't be settled because either the plaintiff attorneys' expectations are too high or their clients. I try to figure out as best I can which one it is.

It's often been helpful to me for a plaintiff's attorney to be candid with me and say, listen, Judge, I agree that X is probably a reasonable settlement and I would like to do that but I can't get my client there and here is why. I don't think that that's disloyal to the client or in any way an unethical violation of that but it's important information for me to have as a judge to know where we are and how likely we are to settle it and then what do we do about it from there.

In cases where plaintiffs' attorneys have asked me to talk to their client to give them the Montgomery view of the world, I'm willing to do it. I never am without plaintiffs' attorneys' requests that I do that, and I think it's real dangerous to do that except under very controlled circumstances.

MR. WEINER: Are you finding that in settlement conferences, there is more that can and should be done with clients? Are attorneys doing as much as they should to educate clients and what might you suggest to them?

JUDGE MORROW: I don't know if they

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understand, at least in Anoka County and I think it's similar in other counties, how jurors view — I've heard plaintiffs' attorneys talk about how there is this defense bar, and the insurance companies are trying to educate the jury regarding all the large awards and how frivolous and so forth.

I think jurors are very, very conservative, and they have their own backaches and pains and troubles. They see this a lot of times as a lottery kind of situation, and they are not going to give a lot of money. I don't think plaintiff attorneys or their clients understand how conservative the jurors are regarding this on most of these routine PI cases.

JUDGE FLYNN: One of the things we've been doing in Ramsey County is ordering summary jury trials, and I suppose it's similar to your arbitration. I don't know if you do it in Anoka. But I think it gives them some picture of what kind of award they can expect to get.

JUDGE MONTGOMERY: The problem with that lies in the quality of the arbitration. I have had cases that have been real difficult to settle because the plaintiffs heard the bell go off at a level that even the plaintiffs' attorney will agree with was better than they dreamed of and then how do you talk a client down from there. They are wonderful when they work. When they don't, it's bad news for the judge in terms of likelihood of settlement. There's a plus and a minus there, I think.

MR. WEINER: Anything you would suggest about the conduct of the settlement negotiations.

JUDGE FLYNN: What I see is they haven't finished their discovery. That all important fact is still missing, and so they can't settle without that one piece.

JUDGE FITZGERALD: The one thing that does drive me up the tree though is there are occasions where they do not come into the settlement conference well-prepared. If they are not well prepared, I can assure you the next time they come in front of me they will be well prepared because I let them know in no uncertain terms.

My rule is that when they come to that settlement conference, they should be as well-prepared for that settlement conference as if they were going through the door and the case was going to be tried, I expect that. I expect that out of the trial court judge, I think we should do that, and I expect that out of the lawyers. If they are not so well-prepared, I let them know. I might very well continue the conference. If it's bad enough, we have the inherent power and it might not be inappropriate to impose sanctions for not being so appropriately prepared.

MR. WEINER: Where is the preparation lacking?

JUDGE FITZGERALD: What's the name of the doctor that's treating the plaintiff in this case.

JUDGE MONTGOMERY: And what are your current medical specials. It bugs me when I know what the specials are from the pretrial statement and the plaintiff's attorney doesn't know what their medical specials are.

JUDGE FITZGERALD: What's the life expectancy of the plaintiff in this case? "I don't know, Judge." "It must be about" or "we will get that at the time of trial." I said, you know you realize that I could order you right out that door right now and we could start selecting a jury. Be prepared. They don't know a lot of the past history of their client, they don't know what's contained in the medical reports from the doctors. They aren't fact specific based upon the questions that are going to be, I think, appropriate for the court to ask and inquire about. I don't find anybody trying to hide things though. I don't think they play games from that standpoint. It's just what I consider to be inappropriate lack of preparation.

JUDGE MONTGOMERY: I would like to second much of what Judge Fitzgerald said in that I find that primarily plaintiffs' attorneys are pretty well prepared at motions. Motion practice I generally find people know what they are going to say by the time they argue it, and basically I find that most attorneys are pretty well prepared.

Unfortunately, and maybe somehow we fostered it, but it seems to be the settlement conference is just sort of a chitchat or bull session and the people just grab the file on the way out the door and come to the courthouse to try to settle. More cases are settled at pretrial than at any other stage, and I think that's the need for real preparation.

There is just no excuse for not knowing

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what the IME said or what the special damages are or what the life expectancy is. Those things you should be really up to date on. We are busy and have lots of files, but I look at that file ahead of time. I don't like to be more prepared than the plaintiffs' attorneys on the status of the case.

I think preparation for settlement conference is probably the single area that I would say is most overlooked.

JUDGE MORROW: Bring your calendar to court. I don't know how many times we've had to stop things when one of the attorneys has their calendar and the other doesn't and they want to schedule later. There are always problem when you do that so we have to stop and have the attorney call his or her office, and sometimes the secretary is not in. Most everybody does it, but it's a simple thing, bring your calendar to court.

Criminal Law Report - Cont.

Prosecutorial Misconduct

State v. Porter (Filed January 13, 1995)

Porter was convicted of three counts of 4th degree criminal sexual conduct. The Supreme Court reverses his conviction and remands for a new trial because of prosecutorial misconduct in closing argument.

The Supreme Court found serious misconduct in the prosecution's closing argument suggestions that the jurors would be suckers for acquitting Porter and that no salve or sedative that would make them feel good about acquittal. The Court found further misconduct in the prosecution's reference to the "James Porter School of Sex Education" which was not based upon any evidence in the record. Further misconduct included the prosecutor's bolstering of its expert witness' credibility and reference to the defendant's failure to call witnesses or to contradict certain testimony.

The Supreme Court concluded that the prosecution engaged in intolerable misconduct directed at the very heart of the jury system. The case was reversed and remanded for a new trial.

Police Lie

State v. Thaggard (Filed January 20, 1995)

Thaggard appeals his conviction for 1st degree criminal sexual conduct arguing that his confession was involuntary and inadmissible and that the prosecutor engaged in misconduct in closing argument.

Thaggard confessed after a police officer lied to him, telling him that a co-defendant had confessed to rape. The officer may have also promised chemical dependency treatment. The Supreme Court found that police should not use trickery or deceit or make promises express or implied in order to obtain a confession, although, in the instant case, defendants confession was not involuntary or coerced.

In closing argument, the prosecutor argued to the jury that their role was to determine whether the evidence was sufficient to convict, the prosecutor also improperly argued that the victim's testimony could not be rejected as false because there was no direct evidence she was lying and the prosecutor called the investigating officer a "good cop". The closing argument also contained other improper argument. The Supreme court found the argument was not so egregious as to require a new trial. The conviction was affirmed.

Sentencing

State v. Chaklos (Filed February 10, 1995)

Chaklos was convicted of criminal vehicular homicide and criminal vehicular operation. The trial court sentenced him to consecutive executed prison terms of 21 months and 12 months. The trial court gave reasons for the execution of the 12 month sentence believing it constituted a dispositional departure. The Court of Appeals found the dispositional departure unjustified and remanded the case for resentencing on the 12 month term to a stayed sentence.

The Supreme Court reverses the Court of Appeals and reinstates the sentence imposed by the trial court, finding the offense conduct particularly serious supporting a durational departure or consecutive sentence.