

5 Tips For Out-Of-Towners Litigating In California

By Erin Coe

Law360, San Diego (May 08, 2013, 10:44 PM ET) -- In light of California's severe state court budget cuts and a host of state-specific business regulations, local experts warn that out-of-town attorneys need to argue their cases extremely efficiently, team up with local counsel and leave the trial gimmicks at home when trying cases in the Golden State.

California touts the largest state court system, with 58 trial courts for each county, six courts of appeal and one Supreme Court, that receives nearly 10 million cases a year, as well as some of the busiest federal courts in the nation. But the state judicial branch has been cut by \$1 billion over the last five years due to state budget woes, resulting in courtroom closures, staff layoffs and reduced hours, and cuts from the Budget Sequestration Act have prompted federal courts in the state to take furlough days.

Businesses in the state also face a highly regulated environment, which can often lead to litigation over special state laws, including the California Environmental Quality Act, the core environmental review law for development projects, and Proposition 65, which requires companies to warn consumers about products that contain dangerous levels of substances known to cause cancer, birth defects or reproductive harm.

This climate is part of what makes litigating cases in California different from other states, according to local attorneys.

"Californians see themselves as on the leading edge of environmental, social and health care issues," said Patrick Richard, a San Francisco attorney who chairs Nossaman LLP's litigation department.

"Although some law professors say there's the majority rule, the minority rule and the crazy California rule, out-of-towners need to be aware of the social differences when preparing to present their case."

Here are some tips for out-of-town attorneys when they are trying their cases in California:

Be Concise

The budget cuts have put considerable strain on the courts, and local attorneys said they are especially starting to see the effects at the state court level, where it is taking longer to get motions heard and cases to trial.

Out-of-state lawyers need to recognize that because they are dealing with overworked judges who often lack the research attorneys, clerks and other requisite resources to effectively administrate over their caseloads, it is more important than ever to argue in a clear, succinct manner and bring only the most important discovery disputes to the judge, according to Bradford Newman, who chairs Paul Hastings LLP's Silicon Valley employment practice.

“Out-of-towners may not understand that the state of California with the budget crisis is dire and that judges’ caseloads don’t get smaller just because the resources have gone away,” he said. “Out-of-towners aren’t going to win the day through lengthy arguments and by not focusing on their papers. They need to understand what’s going on and have their boots on the ground.”

Judges have less time and patience for wasteful motions practice and for counsel who can’t resolve discovery disputes that aren’t critical to the case, he said.

“Judges are sifting out whether counsel on both sides are working together to limit the workload the court is expected to handle,” he said. “If attorneys come in with 100 motions to compel and say they are all in dispute, they are going to get a very negative response from the court. But if they meet and confer in order to limit those disputes down to three, they will get a much better response.”

Lawyers should also be aware that for many civil cases in state court, they will need to supply their own court reporter, said Robert Wright, a Horvitz & Levy LLP partner near Los Angeles.

“Attorneys from out of state might never imagine that they’d need their own court reporter, but most of the time, they do,” he said.

Know Your Audience

Because California’s diversity is reflected across its 58 counties, which all have their own local rules and unique demographics, it means that trying a case near Hollywood is completely different from litigating a matter in Sacramento, Silicon Valley or a more agrarian jurisdiction in the Central Valley, attorneys say.

Lawyers traveling to California to try a case should not only read up on the rules of the particular court and the background of the judge hearing their case, but they should also investigate the jurisdiction to find out what the jury pool is going to be like, according to Randy Crispen, a McKenna Long & Aldridge LLP partner in San Diego.

“In Kern County in Central Valley, it’s likely to be a much more rural and conservative jury compared to a venue like Los Angeles, where you’re likely to have a much more urban jury that has a completely different makeup and is a lot less conservative,” he said. “Lawyers need to tailor the themes of their case to the particular jury, because what might appeal to a jury in Kern County may not appeal to a jury in Los Angeles or San Francisco.”

The jury pool variations between Northern California and Southern California can also sometimes make it seem like an attorney is practicing in a different state, he said.

“The feel and attitudes and priorities of the citizenry are different,” he said. “Generally speaking, juries in Orange County are more conservative and less inclined in most cases to award large damages than in San Francisco, where jurors are more liberal and are more likely to award larger damages.”

California jurors are often highly educated and involved or familiar with the high-tech industry, especially near Silicon Valley, making it important for non-California attorneys to avoid talking down to them, according to Richard.

“Most out-of-state attorneys are surprised by the number of entrepreneurs on a jury or jurors who know people in the high-technology industry,” he said. “To most jurors here, starting a business in a garage is just everyday information to them.”

Jurors in the state also are accustomed to seeing informative PowerPoint presentations with sophisticated graphics, and out-of-town lawyers would be wise not to skimp on the visual effects, according to Richard.

“In one case, an out-of-state attorney said, ‘I don’t have Mr. Richard’s fancy graphics; I only come with the truth,’” Richard said. “I think that attitude is insulting to the jury. The attorney was basically telling them he didn’t take the time to prepare some teaching aids.”

Reach Out to Local Counsel

By connecting with local attorneys, out-of-towners can glean much more information ahead of time on the backgrounds of judges and the potential biases of juries, according to experts.

“In employment cases, local counsel can give insight into judicial backgrounds and whether judges may be leaning toward employees or toward employers,” Richard said.

California attorneys also can serve critical roles when out-of-state lawyers are litigating a case involving a state-specific statute, such as CEQA, or a unique procedure like the state’s anti-strategic lawsuit against public participation statute, which allows for Californians to bring a special motion to strike when a complaint arises from the exercise of petition and free speech rights.

“It’s a good idea to get local counsel to avoid pitfalls in unfamiliar terrain,” said Brad Pauley, a Horvitz & Levy partner near Los Angeles. “Attorneys who are dealing with a case involving a complicated California substantive law is another reason to affiliate with local counsel.”

Steer Clear of Gimmicks

Because judges and jury pools in California tend to be diverse and sophisticated, they are less likely to go for attorneys who lay on thick the Southern charm and slow drawl or turn into a fast-talking East Coaster, according to Newman.

“I find that a lot of the shtick works less and less,” he said. “Nothing works because jurors and judges here are used to diversity, innovation and just the facts. What I find up and down California is that judges and jurors want just that.”

Richard recalled one case he was litigating where an out-of-state attorney began aggressively grilling a witness in cross-examination and firing off questions at a staccato pace.

“If you’re too into your own performance and making sure you got your script in, you might forget how you appear,” Richard said. “You may have won the exchange, but you may have lost the jury.”

While it may be essential for out-of-town lawyers to team up with local counsel in a state like Louisiana, out-of-towners can go solo in California, but they need to remember one thing, Newman said.

“Here, you can be an out-of-towner as long as you’re straight shooting,” he said.

Plan Your Strategy Early

In state court, non-California attorneys need to be mindful that there is a 75-day notice period for bringing a summary judgment motion, and the process should be carefully planned out, according to Gregory Call, co-chair of Crowell & Moring LLP’s litigation group and head of the firm’s San Francisco office.

“It is necessary to get whatever discovery you need for summary judgment well in advance of the discovery cutoff if you are planning on filing for summary judgment,” he said.

Some out-of-state attorneys may not realize that California procedures also require the use of a separate statement of undisputed facts.

“This document, more than the brief in some cases, is the key to prevailing on summary judgment,” he said.

While in federal court and many other states, attorneys can summarily adjudicate a single fact, attorneys litigating a case in California need to fully adjudicate a cause of action, affirmative defense or duty to be successful in summary judgment, according to Call.

“The result is in California you need to plan your summary judgment strategy early and use the plan to move forward with discovery with an eye to developing the undisputed facts that will resolve an entire cause of action,” he said.

--Editing by Elizabeth Bowen.

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