

Presentation to PASD re Code of Civil Procedure
Judge William R. Nevitt, Jr.
September 9, 2015

1. Overview.

PC 1000 is a default rule: “Except to the extent this code provides applicable rules, the rules of practice applicable to civil actions, including discovery proceedings [and proceedings concerning vexatious litigants], apply to, and constitute the rules of practice in, proceedings under this code. All issues of fact joined in probate proceedings shall be tried in conformity with the rules of practice in civil actions.”

Therefore, look first at the Probate Code for a provision applicable to an issue.

Additional authorities potentially apply:

California Rules of Court.

Probate Rules in Title 7 (Rule 7.1 *et seq.*).

Civil Rules in Title 3.

E.g., format of motion papers found in CRC
3.1110 *et seq.*

San Diego Superior Court Rules.

Probate rules in Division IV.

Law and motion rules in Chapter 23 of Division
IV.

2. Pleadings.

Petitions.

Draft with distinct causes of action like a civil complaint?

Responses and objections.

Draft with distinct affirmative defenses like a civil answer?

3. Attacks on pleadings.

Demurrer (CCP 430.10 *et seq.*).

Motion to strike (CCP 435 *et seq.*).

Motion for judgment on pleadings.

Statutory motion pursuant to CCP 438: has limitations,
including a time limit.

Non-statutory (common law) motion: does not have those
limitations and can be made as late as the time of trial.

4. Discovery.

Ensure you have “substantial justification” for every position you take regarding discovery.

Do not take a position that is on the wrong side of a “bright line” established by statute or case law.

Document your “meet and confer” efforts.

5. Motions heard on law and motion calendar.

Need to comply with Chapter 23 of Division IV of San Diego Superior Court Rules.

Tentative ruling procedure.

Currently, the target time for posting a tentative ruling is 4:00 p.m. on the court day before the hearing.

Motions for summary judgment and summary adjudication (CCP 437c).

Common mistake is not using proper format, especially for separate statement.

“Boilerplate” is unnecessary and should be omitted.

6. Trial preparation and trial.

Know what your client(s) – and the opposing party(ies) -- must prove and know who has the burden of proof on each issue.

Review Division 5 of the Evidence Code (EC 500 *et seq.*):

“Burden of Proof; Burden of Producing Evidence;

Presumptions and Inferences.”

Use a “countdown to trial” checklist that begins about six months before the trial date.

Probate judges do not typically issue advance trial review orders (like civil independent calendar judges do).

Suggested trial preparation.

Identify (a) the issues in dispute upon which your client needs to prevail, (b) the evidence that supports your client’s position on each such issue, and (c) how you will get your necessary documents and testimony admitted into evidence.

Subpoena each of your witnesses and, if appropriate, serve a notice to appear on the opposing party(ies).

Provide an accurate time estimate to the trial judge.

Discuss the time estimate with opposing counsel before providing the estimate to the trial judge.

Trial brief.

Not required, but desirable.

Use it to educate the trial judge.

Motions *in limine*.

Why use them in a bench trial?

Split of opinion.

Use them to educate the trial judge?

Joint witness list.

Every trial day, confirm the availability of each witness you have yet to call.

Exhibits.

Pre-mark the exhibits as court's exhibits with beige stickers obtained from court.

Place the exhibits in tabbed, three-ring binders.

Consecutively paginate each page of each exhibit longer than three pages.

The joint exhibit list should be accurate.

Consider preparing a chronology of important events that will be supported by the evidence; and use that chronology as a demonstrative exhibit.

Talk to other attorneys who have tried a case before your trial judge.

If a witness availability or other scheduling issue arises, promptly inform opposing counsel and the judge.

Objections.

Be succinct.

Know which hearsay exceptions you will need to invoke (EC 1200 *et seq.*) to have your testimony and documents admitted into evidence.

Know EC 352: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Prepare a proposed ruling and a proposed judgment and give them to the judge prior to argument at the end of trial.

Educates the judge.

Helps the judge identify (a) the issues on which you want a ruling, (b) the specific rulings you want the judge to make and (c) the judgment you seek.

Facilitates a comprehensive ruling by the court.

7. Post-trial.

Use a post-trial checklist so that you do not miss any deadlines.

Statement of decision (must be requested) and judgment.

Governed by CCP and CRC.

See, *e.g.*, CCP 632 and CRC 3.1590 *et seq.*

During the statement of decision process, do not confuse the relevant terms and be aware of the deadlines involved.

Memorandum of costs.

Should be filed after entry of judgment (CRC 3.1700).

Motions, *e.g.*, for new trial, to vacate the judgment, for attorney's fees.

Governed by CCP and CRC.

See, *e.g.*, CRC 3.1600 *et seq.*

8. A Judge's Ten Tips for Effective Written Advocacy.

9. Questions.

A Judge's Ten Tips for Effective Written Advocacy in a Civil Case in Superior Court
by William R. Nevitt, Jr., Judge of the Superior Court

From my years of practice as a civil litigator and, more recently, as a judge overseeing and trying civil cases in Superior Court, I have distilled the following list of ten tips that members of the civil litigation bar may find of use when engaged in written advocacy before the Superior Court:

1. Before you write anything, identify your goal(s), organize your thoughts, and consider preparing an outline to guide your writing.
2. Tell the judge, at the beginning of your brief, specifically what you want the judge to do.
3. Use your best arguments and evidence, or at least a summary of them, early in your brief.
4. Although it is not always feasible (because of the need to make a record for possible appeal), consider conceding points of law or fact that might otherwise be disputed, but on which you have little or no chance of prevailing – because of the resulting gains in (a) focus and (b) your credibility with the judge.
5. In an opposition or reply brief, either address every relevant point in the other side's brief or state why you are not.
6. Be concise.
7. Don't weigh down your brief with unnecessary boilerplate – because that boilerplate may diffuse the focus of your brief, and it consumes pages that (if needed) can be put to better use.
8. Cite only relevant legal authority and evidence, and be accurate when you do so.
9. Know and follow the pertinent California Rules of Court; and educate your legal assistant regarding the proper formatting of briefs and pleadings. (See, *e.g.*, CRC 3.1110 *et seq.*)
10. Ensure your papers are timely filed and served.

WILLIAM R. NEVITT, JR.
San Diego County Superior Court Judge

CAREER AS SUPERIOR COURT JUDGE:

- Civil and Probate Trials, Probate Law and Motion, Criminal Hearings, and Civil Settlement Conference Department, 2014-2015.
- Civil Trial and Settlement Conference Department, 2012-2014.
- Civil Independent Calendar Department, 2000-2011.
- Civil Trial Department, 1999.
- Juvenile Court Department, 1996-1998.
- Criminal Trial Department, 1995.
- Appointed to Superior Court by Governor Pete Wilson, 1995.

CAREER AS ATTORNEY:

WRIGHT & L'ESTRANGE, San Diego, California
Partner – 1986 to 1995.

WRIGHT & L'ESTRANGE, San Diego, California
Associate – 1983 to 1985.

SULLIVAN & JONES (formerly SULLIVAN, JONES & ARCHER), San Diego, California
Associate – 1980 to 1983.

LEGAL EDUCATION:

J.D. (MAY 1980)
UNIVERSITY OF TEXAS – Austin, Texas

- Graduated with honors in top 10% of class.
- Order of the Coif.

PRE-LEGAL EDUCATION:

B.S. (JUNE 1971)
UNITED STATES NAVAL ACADEMY – Annapolis, Maryland

- Graduated in top 3% of class.

MILITARY SERVICE:

- Officer in United States Navy, 1971-1977.
- Officer in United States Naval Reserve, 1977-1999.