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Citation: 68 Tex. B.J. 152 2005

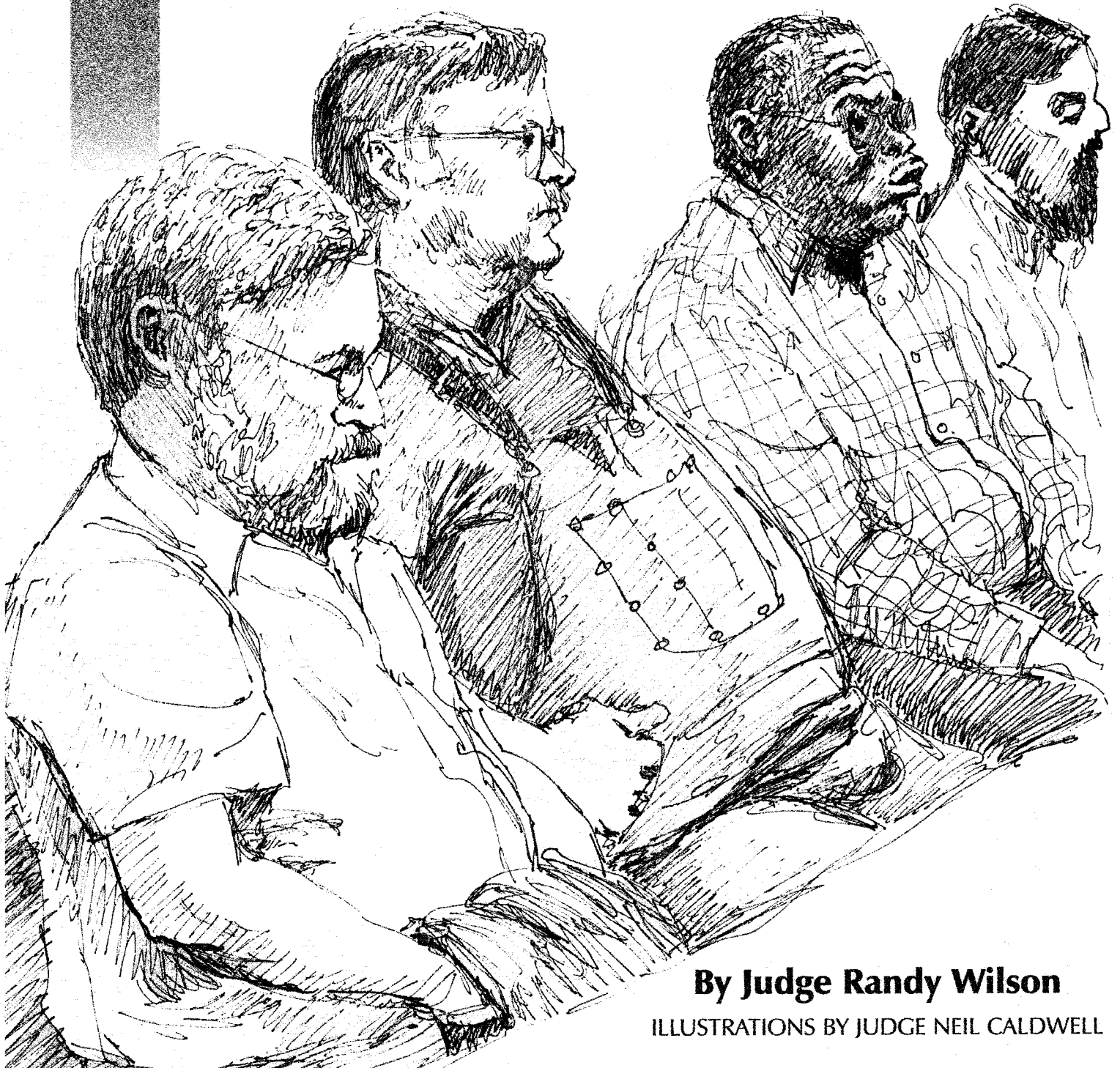
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Fri Sep 3 16:28:11 2010

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What Do Jurors Say

After observing or participating in trials for 27 years — 25 years as a trial lawyer and now two years as a judge — I have some observations about trials, trial lawyers, and what juries like and dislike. I have good news and bad news.



By Judge Randy Wilson

ILLUSTRATIONS BY JUDGE NEIL CALDWELL

About Trial Lawyers?

Jurors are Generally Pleased With the Trial Process

Although most trial lawyers perceive that jurors resent having to serve on jury duty, the empirical data suggests otherwise. The American Bar Association recently conducted a major study to determine public attitudes about jury duty.¹ The findings are surprisingly optimistic:

- 84 percent of the general public believes jury duty is an important civic duty to be fulfilled; and
- 75 percent of the general public want their own disputes to be decided by a jury rather than a judge.

Most encouraging, those who have actually served on juries have a more favorable view of the jury process than those who have never been a juror. In other words, the reality of jury service is far better than the fear of jury service. Other studies² and my own anecdotal experience confirm this. While people try to avoid jury service, once selected, they generally enjoy it and view it as worthwhile.

Despite Generally Favorable Attitudes, Jurors Frequently Have Constructive Criticisms

Jurors are often quite critical of lawyers and their clients during the trial. Judges frequently talk to jurors after a trial, and the jurors open up to the judge. These juror comments and criticisms are often candid and brutally frank. The silver lining is that virtually all of these criticisms are easily corrected.

Jurors hate for their time to be wasted — The most frequently expressed criticism by jurors is that their time was wasted, both during the actual trial and during breaks. The 10-

minute morning break often expands to 30 minutes or more, resulting in an unhappy and inattentive jury. While the judge often dictates the fits and starts of a trial, the trial lawyer can streamline the process:

- Have exhibits pre-marked and ready to go. There is no law that says that the court reporter must mark exhibits. Mark them in advance and have all copies ready. It saves time and makes you look prepared;
- Avoid bench conferences, if possible. The jurors feel left out, which, of course, they are. Further, bench conferences are disruptive. Plan your day and your witnesses in advance. Predict issues in advance and give the judge a heads up. Troublesome issues can be taken up before or after the trial day to minimize breaks and interruptions.

Duplication, redundancy, and other forms of repetition —

Few things bother jurors as much as unnecessary repetition. Duplication takes many forms, from asking every doctor who testifies, "What does it mean to be board certified?" to simply going over topics again and again.³ Jurors despise it for at least two reasons:

- Duplication insults their intelligence. What the lawyer is really saying is, "Even though I've already asked this question 10 times before, I'm going to ask it again because I don't think that you, the jury, got it the first 10 times." The jury is not stupid and grasps the subliminal insult of the lawyer's repetition.
- Duplication wastes the jury's time. In Harris County, jurors get \$6 per day for the first two days of jury serv-



ice and \$12.50 per day for each day thereafter. Presumably, the lawyers are making more. This disparity is highlighted when one party seeks attorneys' fees and evidence of hourly rates is admitted. You can often hear the audible gasps as juries hear evidence of \$300 to \$500 hourly rates, compared to their \$6 per day. Jurors can quickly size up which side is wasting their time and merely running up a bill. A jury that thinks its time is being respected is a happy jury. Happy juries decide cases on the facts and evidence rather than extraneous factors such as the attorney's clothing.

Preparation — Jurors readily perceive who is prepared and who is not. Lawyers are expected to know where they are going, where their documents are, and what topics are to be covered. Jurors hate it when lawyers continually shuffle through their notes.⁴ Simply keep an outline of topics and check them off as they are covered.

Know your audience — One of the most frequent problems I see is lawyers who seem oblivious to their audience. The lawyers are so focused and concentrated on the witness or the points they wish to make, they forget that the jury should be the central focus of the presentation. Some of the most common mistakes are:

- Failing to show documents to the jury while questioning a witness;
- Using words in questions that the jury doesn't understand (referring to the witnesses' prior deposition when the word deposition hasn't been explained yet to the jury). In one trial, a lawyer asked the first witness about "cross-elasticity of demand." Not one juror understood what he was talking about. But, since this economic concept had been discussed at length during discovery, the lawyers and the witnesses were quite versed in its meaning and nuances. Unfortunately, the one audience that mattered, the jury, was left in the dark;
- Having your back to the jury, blocking the jury's view, or talking so low that the jury can't hear.

Objections and motions — At some point in legal history, lawyers began passing the myth from generation to generation that jurors hate objections and will punish the overly objecting lawyer. That myth contains a germ of truth, but it misses the mark. Jurors know and appreciate that a trial is combat between two competing sides. Jurors expect lawyers to be advocates and gladiators. But, and this is a big but, jurors expect the lawyers to be civil and maintain decorum. Objections are fine so long as two rules are observed:

- Make sure you're right. If you continually lose your objections, the jury perceives you are weak and don't know what you are talking about. Go down the road of losing objections only if it is essential for appeal.
- Make sure the objections don't unnecessarily delay the trial. If you make a technical objection that can be fixed and your opponent then shows he or she knows how to cure the problem (lay a business record predicate), quit making the same objection. If the same objection time and again results in five extra minutes of questions but

the evidence nevertheless being admitted, stop it. All you are doing is delaying the trial and bolstering your opponent's perceived technical prowess.

Demeanor — One of the most frequent juror criticisms of lawyers concerns their demeanor: how the lawyers relate to the judge, the opponent, the witnesses, and the jury. In order to appreciate fully how important demeanor and conduct is, you must understand that jurors observe everything. They look at your clothing and whether your shoes are polished; they see you roll your eyes or wince as a witness gives a bad answer; they see you don't know how to get evidence admitted; they see you talking on your cell phone or abusing your legal assistant. In short, jurors are keen observers of everything that occurs in or around the courtroom and draw conclusions — good or bad — based on what they see. Here's what jurors say:

- Show absolute respect to the judge. Even if you disdain the judge or his or her rulings, be respectful. The jury will identify with the judge every time on every ruling.
- You can hammer a witness and yet remain courteous. Jurors hate sarcasm. Lawyers who deliberately misconstrue and twist testimony lose credibility with the jury. It is not necessary or prudent to treat every witness as a liar unless you have major variances from truth proved beyond doubt.
- Watch your facial expressions. Jurors are not impressed when lawyers roll their eyes and snicker. These childish outbursts turn off a jury more quickly than anything I've seen.
- Instruct your client on emotional displays. Carefully tell your clients before trial that they should listen politely and attentively to all of the testimony. If unfavorable testimony is admitted, the client should simply make notes or write a note to the lawyer.
- You and your client are on stage from the moment you get close to the courthouse. Watch how your drive, cross the street, or talk to your staff. Be respectful and courteous to everyone. If you must use the phone during a break, go to another floor and use the pay phone. One jury said that it resented the fact that the client acted like a big shot in the hall during breaks by barking orders to his assistant on his cell phone. In another case, one side brought in catered lunch daily for its side's witnesses, parties, lawyers, and staff. While they tried to conceal it by going to a different floor, the jury still smelled it and figured it out. You should assume that from the moment you arrive at the courthouse, the jury sees everything you do and hears everything you say.
- Ironically, the most effective trial lawyers are the most civil — those who say, "so long as it's not privileged, you can have whatever documents you wish to see." Or those who cooperate in stipulating to the admissibility of exhibits. A lawyer can be a tremendous advocate and yet still cooperate on non-outcome determinative matters.

One of the best ways to demonstrate the subtle nuances that jurors observe is to reprint comments made by jurors in one survey:

I don't like the way he cut people down. He went ahead and did some things that the judge had already said not to do.

I didn't like his character bashing. It was very unprofessional. I couldn't help but wonder why she handed her witness a sealed envelope when he left the courtroom after testifying.

He used ridiculous suggestions to try to put doubts in our minds or confuse us. It was very obvious what he was doing, almost to the point of insulting our intelligence.

I did not like the way she rolled her eyes during the opposing witnesses' testimony.

The belittling of plaintiff's witnesses did not help their case. I felt insulted.

Her habit of scratching is distracting.

He was too animated with his gestures. I did not like the way he slammed down exhibits when he felt witnesses were not cooperating.

He made gestures and comments (for the jury to see and hear) each time coming back from the sidebar. He would also give witnesses for the other side dirty looks as he would go to sidebars. This was unnecessary.

I disliked his conversations with his assistant which the jury was meant to hear. I know it's a lawyer's tactic but it became very annoying. I also disliked his attempts to demean some of the witnesses.

He was very rude to about practically everyone and everything during the trial.

Better organization would create believability, trust, and strength.

I was unimpressed by his lack of organization.

He seemed a little disorganized. He swore at his assistant and his constant clearing of his throat made me want to tell him to take a deep breath and relax.

He seemed disorganized when searching through notes and exhibits.⁵

Ultimately, the jury will do the right thing — Lawyers can make a number of improvements and do a better job. But in the final analysis, it's the facts, witnesses, testimony, and documents that win trials, not lawyers. I've seen good lawyers lose to weaker opponents and very poor lawyers win over skilled adversaries. One judge put it well:

If you can get over the humbling effects of this proposition [of realizing that your performance does not determine who wins or loses], I think it can be truly liberating. You can relax, you can have fun, and, ironically, you can do a better job. Don't blame yourself for having bad facts, and don't confuse the value of your performance with the outcome of the case.⁶

In the end, the best advice anyone can give to a trial lawyer is professionalism — simply be professional in your approach to the witnesses, opposing counsel, the judge, and the court staff. The lawyer who displays this professionalism, who focuses on the major issues of the case and doesn't dwell on petty disputes, is the lawyer who gets the ultimate jury compliment — asking for the lawyer's card at the end of the case.

NOTES

1. "Jury Service, Is Fulfilling Your Civic Duty a Trial?" Prepared for American Bar Association, July 2004, available at <http://www.abanews.org/releases/juryreport.pdf>.
2. D. Brock Hornby, "How Jurors See Us," 14 Maine Bar J. 174 (July 1999).
3. Raymond J. Brassard, "What Jurors Say About Lawyers," 47 Boston Bar J. 8 (January/February 2003).
4. Brassard, *supra*, at 177.
5. Orlie D. Smith, "Essay From the Bench; Lawyer Performance From The Jury's Perspective," 68 U. Mo. K. C. 185 (Winter 1999).
6. Morris B. Hoffman, "Ten Trial Mistakes," 30 Tenn. Bar J.28 (September/October 1994).



RANDY WILSON

was appointed judge of the 157th District Court in Harris County in April 2003. A graduate of the University of Houston Law Center, he was a founding partner in Susan Godfrey, L.L.P. Wilson is certified in civil law by the Texas Board of Legal Specialization.

Illustrator **NEIL CALDWELL**

retired as judge of the 23rd District Court in Brazoria County in 1994, but remains active as a visiting or assigned judge. A graduate of the University of Texas School of Law, Caldwell served for 16 years in the Texas House of Representatives.

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