

## Tips From the Bench

### Last Minute Settlements on the Courthouse Steps Ways to Overcome Barriers to Settlement

by Judge Jerome LaBarre  
Multnomah County Circuit Court

We've all seen it many times. A case is fiercely litigated on both sides. ADR and direct settlement talks are unavailing. Both sides wave their swords aggressively at one another. Yet shortly before or on the day of trial, the case settles. Again and again, the lawyers say to themselves and sometimes out loud, "the case should have settled earlier."

How can this expensive and exhausting last-minute timing be avoided? How can a more business-like and lower stress settlement process start earlier? These are longstanding questions to which there are no easy answers, but having watched the game play out from both sides and from the bench I have some ideas which may be helpful.

Sometimes the explanation for the delay in meaningful settlement discussion is simply procrastination, overwork or a sense of denial. Sometimes final case evaluation and establishing communication between counsel takes more time. Suffice it to say that no real progress can be made until the negotiators and decision makers become focused and motivated. When a case just coolly drifts along, then settlement usually cannot be achieved until things get hot. To start things up, steps must be taken to get everyone's attention and to get them to be realistic.

**Creating a Sense of Urgency**  
Dispute resolution obviously takes time. The plaintiff starts the case and must be the driving force to keep up the pressure to move the case to conclusion. Claims get made but often are not taken seriously. Cases then get filed and even with the automatic trial date settings they do not receive focus. Ultimately when the "date certain" trial date gets really close, that is when serious settlement offers finally start to be exchanged. But this causes way too much trial preparation expense and emotional stress for everyone.

Some steps that can be taken to impose a sense of immediacy in the litigation are:

**1. Imposing a "Drop Dead Date" (i.e., getting a "real" trial date)** - Among judges it is generally agreed that getting a firm and fixed trial date and sticking to it is one of the best ways to bring about settlements. Sometimes the automatic trial dates are not credible enough, so early assignment imposes the needed firmness.



**2. Early Assignment to a Trial Judge** - In Multnomah County for complex cases, they can be assigned to a trial judge for all purposes once they are designated as complex. Upon request to the presiding judge other cases in need of case management can be assigned to a judge for all other pretrial purposes. Cases which will last over five days or extend into a Friday or the following week are also special. They can also be assigned out much earlier than daily call. Again and again, I see that firm trial dates lead to settlements.

**3. Schedule Important Deposition Dates** - Sometimes key decision makers do not become focused and motivated on the case until they get involved in a concrete way. If they are fact witnesses, consider deposing these people early and time your settlement overtures accordingly.

#### In Praise of "Noisy" Trial Preparation

Oregon honors its beloved "trial by ambush." But making it clear to the other side that you are ready and are busily pursuing trial preparation can lead into a settlement. The more you look to the other side like you are ready for trial the more interested the other side probably will be in settlement.

Some examples of "noisy" trial preparation are:

- 1. Ask opponent for stipulations about trial exhibits** - Let them know you are dealing with the nitty gritty and will be ready for trial.
  - a. Get agreements to admissibility of exhibits into evidence, or if that is not forthcoming, get agreements of no objection to foundation and authenticity.
  - b. Discuss calling witnesses out of order based on scheduling problems.
- 2. Propose a trial readiness conference and/or case management order**
- 3. Call opponent and discuss matters which may be needed for the pretrial conference with the judge, such as:**
  - a. Jury questionnaire
  - b. Exhibit lists and trial exhibits to exchange

## Juror Complaints Mirror Judge Complaints

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In July/August's *Multnomah Lawyer*, Tyler Bellis provided a list of Multnomah County judges' pet peeves. As I read the list, I was struck by the similarities to what jurors say are their top pet peeves. As a litigation consultant, I've interviewed jurors for post-trial debriefings, shadow jurors, mock jurors, and participated in countless jury selections. With this background, below is a list of complaints I've consistently heard from jurors; not surprisingly, what irks judges also irks jurors.

**1. Bad Behavior:** Bellis referred to this as "incivility" and "casualness and unprofessionalism." He said that "lawyers' effectiveness to the judge and jury" is undermined when the lawyers "snipe at one another." He also says that "it does not impress the judge or jury when lawyers bicker with or interrupt each other." 100% yes! I can recall a trial where the lawyers' animosity toward each other was so palpable, jurors asked to be moved further away from counsel. You've had a long relationship with opposing counsel, but the jurors have just met you. They have no knowledge of the months or years of battle; they have no context for the private arguments that you bring

- c. Motions in limine
- d. Summary joint statement of the case to be read to the jury at the outset.

The practice of law is part science and part art. There will always be procrastinations and last minute decisions. However, as a judge I have seen that there are often ways to get past the barriers. Creating a sense of urgency and using "noisy" trial preparation are some ways to do this. Find approaches to start productive settlement discussions sooner, rather than later. When this happens, everyone benefits.

to trial. Rudeness, belittling, bickering, and disrespectful behaviors can all feed the preexisting attitudes that many jurors have about attorneys. Best to not fan the flames.

- 2. Wasted time:** Bellis referred to this as "tardiness." The slow pace and delays might not be your fault, but jurors will still blame the attorneys. You can help by always responding, "Ready to go" (when asked), reducing side bars and objections, and having a clear, efficient game plan. You should also consider that there are situations where jurors think you're wasting time simply because they do not understand the process. For example, jurors often don't understand why attorneys have to lay foundation. Instead, they think the attorney is taking a long, painful road to get to the interesting testimony. Look for opportunities to be efficient with laying foundation.

- 3. Lack of clarity:** Bellis referred to this as "accuracy." In particular, the statement, "Advocacy should be looked at more surgically; often, less is more," hit a nerve. He said too often judges need to "hunt for relevant support." While a slightly different context, jurors' complaints are similar. Often, they have to do the work of the attorney - they have to figure out where, why, and how the arguments and evidence prove a particular point or are relevant. Jurors grow weary if they have to exert too much mental energy figuring out what's really going on. One simple solution is to signpost more: provide verbal outlines, number points as you move along, and use summary graphics. You can also use clarifying transition statements. For example, in a witness examination, the following example tells jurors why the questions being asked are important and relevant: "One of the elements of a negligence claim has to do with whether or not the action or inaction was reasonable, so I want to ask you a few questions about what one might consider reasonable..."

- 4. Lack of brevity:** Bellis mentioned this related to motion briefings. In trial, it's the opening, closing, or even a witness examination that goes on, and on, and on. Recall point 3, and remember

your opening and closing need to efficiently and clearly get to the point. Jurors' attention spans are the same as everyone else's on the planet; according to 2015 research, that is only 8.25 seconds!<sup>1</sup> While repetition is vital for making an important point stick, too much repetition only bores (and angers) jurors. Many writers assert that nothing is good until the sixth or seventh draft and the hardest work is cutting, not the actual writing.

- 5. Disorganized presentations:** Long-winded openings, closings, or witness examinations stem from disorganization; and disorganization often comes from what Bellis called "insufficient preparation." Disorganization leads to the rambling speech where one says things like, "...but, I'll talk about that later." Or "...oh yeah, let me come back to what I talked about earlier." Or, "I forgot to mention..." A disorganized presentation means that little to nothing will be retained by your audience, since they are spending so much mental effort trying to figure out what's going on. The best way to improve organization is to figure out the three to five central things that you must prove to the jury and make those the main points of opening and closing. This requires tough choices about what to include and what not to include. If everything is important, nothing is important. The more you say, the more jurors will forget. The less you say, the more they will remember.

One final comment about Bellis' "know your audience" complaint. He remarked that you need to know your judge, but you also need to know your jurors. Doing so in *voir dire* is critical. It's the only time you learn about the experiences and attitudes that shape the way they view the world. Not only is the information invaluable for informing your strikes and cause challenges, but you also learn things that you can incorporate into your overall trial strategy.

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<sup>1</sup> National Center for Biotechnology Information, U.S. National Library of Medicine.