

## Tips From the Bench

### Putting on the Black Robe

#### Case Evaluation - How it Looks Different from the Bench

by Judge Jerome LaBarre  
Multnomah County Circuit Court



While in the courtroom, I went over to counsel table before the start of the trial to say "Hi" to the new attorney. When I shook his hand it was dripping wet. How well I remember being "In the Land of Butterflies & Sweaty Palms." Thankfully it's no longer that way for me, since I went on the bench. As a matter of fact, a lot of things look different to me. As a lawyer I had tried over 100 cases and thought I knew a lot about case evaluation. But over the years as a judge, I have revised many of my views.

One of the big changes is how cases look at first glance. This is an important time in the life of a case. As your mother said, "You only get one chance to make a good first impression." Trial consultants call this "primacy." Remember that juries and usually even judges and arbitrators are seeing a case at the time of trial for the first time. Even though first impressions have their limitations, they still carry a lot of weight.

Case evaluation technically reduces itself to liability, damages, and of course the overriding consideration of settlement impact. "Is there a case there?" "What is its value?" "What are the selling points?" As a judge doing case evaluation I view the evidence, the people and the law differently than I did as a lawyer.

#### Viewing the Evidence

When I was a lawyer I used to live with big cases for years. More than once I got lost in a thicket of trees and could not see the forest. Judges and neutrals need a presentation which emphasizes the big picture. Important factors concerning the evidence include:

- **Simplicity** - How does the case sound when described in a two minute "elevator speech?" Is it a compelling story?
- **Strength** - Are there "smoking guns?" Is there evidence that can really sway things one way or the other and ties to a theme?
- **Value** - Are the damages readily calculable from objective economic proof? Can non-economic damages be linked to something concrete?

#### Viewing the People

Cases are about people. They involve the heart as well as the head. As a lawyer handling complex business litigation for many years, I tended to forget this. Now every time I go on the bench I am reminded of the human condition. There is

no getting away from the fact that a likeable client with an appealing story makes a big difference. And the opposite is true. Bad behavior can make the trier of fact angry. Neutrals are instructed not to let bias, sympathy or prejudice enter into their decisions. But emotions still enter the courtroom. They are just too powerful to keep out. Positive emotions sell better than negative ones. Some things which come to mind are:

- **Totality** - How will the parties and the case present overall? Is the whole greater than the sum of its parts?
- **Affinity** - How will the kind of people who are jurors relate to the kind of people who are the parties and witnesses?
- **Sincerity** - Will the key players sound sincere? When injuries and disabilities are described, will they be convincing?
- **Soul** - What are the intangibles? By the time the jury or arbitrator goes out to deliberate, will one side or the other seem to have presented a righteous cause?

#### Viewing the Law

Do you remember the story of the tortoise and the hare? As a lawyer, I recall creeping in my legal analysis at the pace of the tortoise. Now as a judge, I need to fly. State court judges must be quick studies. The cases usually come at you fast. You must decide the law and then quickly move on to the next case. Lawyers writing briefs or making oral arguments need to bear this in mind. Some thoughts on this are:

- **Put it Up Front** - Are the most convincing arguments mentioned first?
- **Game Changers** - Is there something dispositive present? (Like a triable issue of fact in a state court summary judgment motion?)
- **Balancing** - Will the motion or other procedure actually be something on which you can prevail? Will it produce more heat than light?

Many things go into case evaluation. Decisions need to be made like "Should I take the case?" "Should I settle it early?" "Should I try it?" Practicing law is both an art and a science. There are no simple answers. All I know is that case evaluation really does look different from the bench.



## News from the Courthouse

by Jason Posner  
Court Liaison Committee

### Presiding Judge's Report

#### East County Courthouse Meeting Location

The committee met at the East County Courthouse (ECC). The ECC opened in May of 2012 and has 38,821 square feet of usable space, of which 25,514 is assigned to the circuit court for three courtrooms and associated space for judges' chambers, jury rooms, and a clerk's office and court support space.

Two of the ECC courtrooms, located on the second floor, are designed for jury trials, and the third, located on the first floor, is a non-jury courtroom. The first floor courtroom is used for traffic and criminal first appearances, and other non-jury matters. The non-jury courtroom is also used for family law hearings when the other two courtrooms are in use.

Judge Waller highlighted some advantages and differences of the ECC. There is free off-street parking. Inside the ECC, the court is state-of-the-art for evidence presentation, using internet-connected video communication and presentation technology. All three courtrooms are spacious and well illuminated. Although no felony offenses or in-custody proceedings permitted to be conducted at the ECC (due to site restrictions agreed with the City of Gresham and the Rockwood Neighborhood Association), the courthouse handles out-of-custody misdemeanor cases and violation offenses which occur east of 122<sup>nd</sup> Avenue.

Judge Waller said that starting in September, 2014, some civil jury trials scheduled to begin on the first Monday of a month have been assigned from the trial readiness calendar to the ECC for trial, upon concurrence of the parties to the ECC location. These cases remain on the presiding judge's call calendar and are assigned from that calendar on the Friday before the assigned Monday trial start date. A trial

judge is assigned at Friday call to begin the trial in the ECC the following Monday. Jurors are summonsed to the ECC for these civil trials and jury selection takes place at the ECC on Monday morning.

Beginning in July, 2014, the family court began hearing Family Abuse Protection Act ex parte petitions every Monday afternoon at the ECC, with video connections to both the downtown courthouse and the Gateway Domestic Violence Program for the judge sitting in the ECC. Also since July, 2014, each Wednesday, a family law judge conducts hearings at the ECC, and holds domestic relations ex parte hearings at 8:30 a.m. and 1:30 p.m. for east county attorneys. And, finally, there is a monthly "Truancy Court" proceeding conducted in cooperation with the east county school districts on one evening each month. The truancy court is intended to increase school attendance, especially for younger students.

Judge Waller concluded by adding that the court will, when there are staffing resources to support it, add small claim and FED proceedings to the ECC's calendar. If additional staff positions are created by the 2015 legislature, then it will be possible to add these cases to the ECC calendar.

#### The New Multnomah County Courthouse

Judge Waller announced that both the chief justice and the State of Oregon Department of Administrative Services have given written preliminary approval to the new courthouse project for Multnomah County. This is an important step. Under the 2013 legislation, the executive, judicial and legislative branches of state government are partners with the Multnomah County Board of Commissioners in the funding for the new courthouse. A change of mind by any one of these partners puts the construction of a new courthouse at substantial risk.

To maintain political alignment among the state inter-branch decision makers and the

county decision makers, State Senator Chuck Thomsen and State Representative Jennifer Williamson are co-chairing the "Central Courthouse Delivery Team," which is made up of members across each of the jurisdictions with a role in the funding approval and also includes circuit court, MBA and OSB representation, as well. This committee is another element of support, communication and, when needed, problem solving for the delivery of a new courthouse for Multnomah County.

Judge Waller told the committee that the new courthouse project manager and the owners representative have concluded the "reference design" based on the National Center for State Court's program plan, as constrained by the \$250 million budget cap. The next step in the schedule is for the Multnomah County Board of Commissioners to proceed with the identification of the primary site for the location of the new courthouse. That decision was expected at the end of 2014.

#### Acting Court Administrator Barbara Marcille

Judge Waller said the judges of the court have decided to discontinue the current recruitment process for a new trial court administrator and to appoint Deputy Trial Court Administrator Barbara Marcille as the acting trial court administrator effective on January 1. Judge Waller explained that the court needed more time for the recruitment than was available and determined that appointing Marcille to be the acting administrator will permit the smoothest transition; she has been an employee of the court since October, 2011. Prior to her work in Multnomah County, she worked for the circuit court in Clackamas County and, prior to that, was a trial court administrator in Los Alamos County, New Mexico, for several years before relocating to Oregon. Judge Waller said that the recruitment will be re-visited in 2015.

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