

Tips From the Bench

Reflections on Juries Jury Trial Skills Still Matter

by Judge Jerome LaBarre
Multnomah County Circuit Court

Some things never fade in importance. Litigators still need to know how to handle a civil jury trial from beginning to end. This may seem counter-intuitive. With the drastic decline in civil jury trials in recent years it would be logical to conclude that these skills are no longer important. But that would be a fallacious assumption. Here are three reasons why jury trial skills remain important even if you rarely try such cases.

1. Jury Skills Give Credibility in Settlement Negotiations

In handling litigation, you prepare for war but hope for peace. If you are perceived as a "paper tiger" the other side has little to fear in pushing an unfavorable settlement upon your client. When you make your "drop dead final" settlement offer, you have got to have credibility when you say that you will win at trial if the case is not settled. If you are clueless on how to try a case this will show and will hurt you badly. This is not just a theoretical problem.

There are now an estimated 9,200 practicing lawyers in the tri-county area. Yet for a number of years there have been only an average of about 100 civil jury trials per year tried in the Multnomah County Circuit Court. Far fewer are tried each year in USDC-OR. Do the math. You will see that very few lawyers are now trying civil jury trials with any regularity. The obvious conclusion from this is that if you are knowledgeable - or better yet experienced - in trying a case to a jury you will get better settlement results. No one is afraid of paper tigers.

2. Jury Trials Help with Case Evaluation Insights

In over four decades of involvement in civil jury trials I have concluded this. Good instincts for case evaluation are the mark of highly successful litigators. This skill plays out at every stage of a case, from beginning to end. In essence this means being able to separate the cases which are winners from those that are losers. Not only do you need to decide whether you will prevail on your theory of the case but also what amount you should estimate as a reasonable recovery. Classically,



this is done by looking at what kind of a verdict a jury is likely to return if the case is tried. After that, one needs to scale back to a reasonable settlement figure.

But what if you are clueless about juries? Very simply, you cannot make predictions about what a jury will do if you know nothing about the jury trial process. It is not just a matter of reading jury verdict reports. You must be able to visualize how your client's case will play to a jury to do the best job of case evaluation. For plaintiff's lawyers financial success depends upon this. For defense lawyers this is crucial in avoiding a disastrous verdict.

3. Jury Skills Translate to Arbitration and Mediation

Today, for every civil case tried to a jury there are many hundreds which are arbitrated or mediated. Of course there are specific skills to learn for ADR. However, in my opinion, well honed trial skills also translate into both arbitration and mediation success. Good persuasion is the challenge which you face in trial and in other forms of dispute resolution.

There is no better way to develop good skills in persuasion than by learning about trying cases to a jury. True, the specific techniques and rules vary greatly between jury trials and ADR. Also, there are many special skills which you need in your toolbox to either arbitrate or mediate. But at the end of the day it all comes down to convincing the decision maker of the merits of your position. In the world of persuasion there is no greater challenge than being able to convince a jury to award your client a verdict.

In conclusion, litigators still need jury trial skills. The new expedited civil jury trial authorized by UTCR 5.150 is one way to start gaining jury trial experience. Give it a try.

Correction:

In my December "Tips from the Bench" column, I equated service by fax with service by hand; but the rules provide (ORCP 9F) that in fact, service by fax is equivalent to service by mail for purposes of ORCP 10C. Therefore, in the context of giving notice of a proposed order or judgment, an additional three days is added to the period after service before the faxed-served judgment or order can be presented to the court, just as if the fax had been mailed to the other party. (This, by the way, contrasts with the treatment of service by email, where permitted under ORCP 9G; email service is effective when receipt is confirmed.) I apologize for contributing confusion when I wanted to shed light, and thank attorney Matthew Whitman for calling this to my attention.

Judge Leslie Roberts

News from the Courthouse

by Eric Dahlin
Davis Wright Tremaine

Presiding Judge's Report

Presiding Judge Nan Waller became the newest elected and confirmed presiding judge for the Multnomah County Circuit Court in January, replacing Judge Jean Kerr Maurer, who had been presiding judge for the prior four years. Judge Maurer is still serving as a circuit court judge in the regular trial rotation. Judge Waller most recently served as the chief family court judge. Judge Maureen McKnight is the new chief family court judge, effective January 1. Judge Julie Frantz continues as the chief criminal judge. Within the family court, Judge Katherine Tennyson continues her role as the chief judge for probate and protective proceedings.

New Multnomah County Case Management Supplementary Local Rules

The new Multnomah County Supplemental Local Rules (SLRs) 2.011, 7.011 and 7.015 take effect on February 1 and will apply to all civil cases filed on that date or later. The new rules change how the court will manage civil cases. The essence of the new rules are (1) a civil case docket cover sheet is required to be filed at the same time any new lawsuit is filed, (2) there will be a single judge assigned to a case for all pretrial motions (other than summary judgment motions), and, (3) there will be an early initial case management scheduling conference for every case and a later trial readiness conference in lieu of the current practice of multiple call dates for case status reporting. The full text of the 2012 SLRs is at: <http://courts.oregon.gov/Multnomah/>.

Although the new rules are in final form, the committee of judges who developed the rules is working on best practices to implement the rules; the committee is purposefully being flexible in the implementation of the rules to best adapt to feedback the court receives. Judge Waller reported that she is attending the committee meetings as well as representatives of the Oregon Association of Defense Counsel and the Oregon Trial Lawyers Association. The goal for the procedures around SLR 7.011 and 7.015 is to establish processes that serve all parties effectively. The presiding judge said that she is open to suggestions regarding the new rules; she asks the MBA membership to provide feedback to her and the

committee as the processes are published and implemented.

To educate the bar about the new SLRs, the MBA held a lunch-time seminar in December for nearly 100 lawyers and paralegals in presiding court. The brownbag informed the bar of the intent of the new rules and was also quite helpful for the judges presenting because the audience members raised issues that the court will address in the implementation of the rules.

East County Courthouse

Judge Waller reported that the East County Courthouse is on schedule to open in April. She and Doug Bray are still working on securing the state funding for the purchase of furniture, equipment and computers for the new courthouse; that funding is mandated by statute. The East County Courthouse will include CourtCare space which will be similar to the downtown facility.

eCourt

The eCourt implementation begins with Yamhill County Circuit Court in June, 2012. Following Yamhill County, the second wave of implementation in "early adopter" counties will occur in late 2012. Multnomah County will begin implementation at the end of the early adopter cycle in mid-2013 with civil cases being the first case type implemented. It will take approximately 1.5 years for all of the Multnomah County case types to be in the Oregon eCourt environment.

UTCR

The state courts are in the process of adopting new Uniform Trial Court Rules (proposed UTCR Chapter 22) that set additional standards for security, confidentiality and access to information in filed court documents. The public comment period on these proposed rules runs 49 days from publication of notice in the *Oregon Advance Sheets*. The text of the proposed 2012 UTCR changes is at: <http://courts.oregon.gov/OJD/programs/utcr/utcrules.page>.

The new UTCR seeks to address the accessibility online of sensitive but public information. The proposed rule sets varying degrees of access to documents online. For example, lawyers who are counsel of record for a particular case will have the highest level of public access to their case, and a member of the public who is not involved in a particular case would have the lowest level of access and thus may not be able to view certain sensitive documents from external locations. If a public document is not available online, the document will be available for viewing via internal kiosks at

the courthouse; the public will have access to public records in the courthouse as they do today.

Court Funding

Chief Justice De Muniz asked members of the bar and the business community to contact legislators to educate them about the role of the courts and how "fully functioning courts" are essential to preserve access to justice and why it is crucial that court funding - which has been cut repeatedly already over the last several years - not be cut more.

For the current biennium, the legislature held back 3.5% of the state court's funding, with the idea that if the revenue projections improved, that amount would be restored to the Oregon Judicial Department's budget, but if the projections did not improve that amount would be cut from the court's budget. The legislature will decide in the February session whether this funding will be restored or if the amounts already held back will be a further permanent cut in resources for the last 15 months of the 2011-13 biennium.

Oregon eCourt is funded by bond sales and the purchase and installation of the system is paid from the proceeds of these sales; eCourt is not a general fund obligation except as the debt service on the bonds is due. Oregon eCourt will provide a large component of ensuring access to justice because it allows the public greater access to the courts through web-based services for document assistance, filing and payments. Also, the new system will help the courts run more efficiently in the face of the current and possible future legislative reductions in resources; electronic filing and documents permit efficiencies in service not possible in a paper-based world.

The chief justice is aware that the legislature is faced in February with making difficult decisions with the limited resources available, but is hopeful that he and the bar-business group can convince the legislature of the importance of funding the courts.

Expedited Jury Trial System

Judge Waller reported there have been six cases that have gone through the expedited jury trial system to trial. The lawyers and the judges in all of those cases seem to have found this to be a positive experience.

WinterSmash

The MBA's Annual WinterSmash, a bowling party which benefits CourtCare, is February 25, from 6-9 p.m. at the 20th Century Lanes. Visit www.mbar.org for details.