FROM MY SIDE OF THE BENCH

Folklore and Myths

BY HON. RANDY WILSON

I REPEATEDLY SEE LAWYERS MAKE THE SAME MISTAKES over and again, probably for no reason other than the fact that they once saw it done thirty years ago as a baby lawyer, or they saw it on television. Allow me to debunk some myths.

- **"Objection! The question exceeds the scope of direct."** This might be a fine objection in federal court, but it doesn't carry much weight in state court. *See* Tex. R. Evid. R. 611(b). Nevertheless, I hear that objection in almost every other trial.
- **"I tender the witness as an expert."** While we're on the subject of state vs. federal rules, there's no need in state court to tender a witness as expert or seek a ruling by the judge that the witness is an expert. Just ask the expert your questions.
- **Prior jury service.** During voir dire, lawyers often, and appropriately, inquire about whether panel members previously served on juries. However, all they ever ask is whether they rendered a verdict and either don't ask who won, or, if they do, they are immediately met with an objection.[1] First, merely inquiring whether a panel member rendered a verdict in a prior jury service is about as unhelpful as anything I've ever heard. Second, the law doesn't restrict voir dire to merely whether a verdict was reached. It's simply a myth. While it is within the trial court's discretion whether to permit such questions in order to save time, there is no absolute prohibition. *Batiste v. State*, 2005 WL 3065882 (Tex. App.—Houston [14 Dist.], 2005).
- **Comment on accuracy of prior witness testimony.** Questions are frequently asked, "You heard the testimony of Witness X; was his testimony accurate?" This is usually met with the objection, "Objection! Improper for one witness to comment on the testimony of another witness." There is no such rule or objection. Of course a witness can be asked if another's witness' testimony was accurate. However, if the question had asked whether the prior witness had lied, then an objection of "speculation" might well be appropriate, since "lying" or "perjury" requires an element of intent, and one witness cannot know what another person knew or didn't know.
- **Court reporter must mark exhibits.** There is no rule that requires the court reporter to mark exhibits. That may be the way George C. Scott and Jimmy Stewart did it in *Anatomy of a Murder*, but it's not the way we do it now. Mark the exhibits yourself, or, better yet, have your exhibits pre-marked and ready to go.
- **Business Records of a third party.** During almost every trial, I hear this argument: "Judge, this document (written by some third party) is contained in some business' files, and therefore is admissible as a business record." I don't know who founded the notion that merely because some document is contained in the records of a business that it's admissible, but it's a myth. Nevertheless, people routinely try to prove up letters and memos from A to B that happen to be in C's file. To prove up a business record, someone has to testify that the record was written by someone with knowledge of the information contained in the document and that it was the regular practice of that business to make the document. Tex. R. Evid. R. 803(6). As a result, the business record statute generally "does not authorize admission or records of information received from other sources." *SW Indus. Inv. Co. v. Scalf*, 604 S.W.2d 233, 237 (Tex. Civ. App.—Dallas 1980). The exception is when the witness can testify that the creator of the document had personal knowledge of the information and the witness' company then relied upon such information and incorporated it into its own records. *Duncan Dev., Inc. v. Haney*, 634 S.W.2d 811, 814 (Tex. 1982); *Bell v. State*, 176 S.W.3d 90, 92 (Tex. App.—Houston [1st

Dist.] 2004). *See McElroy v. Unifund CCR Partners*, ___ S.W.3d ___ (Tex. App.—Houston [14th Dist.] August 26, 2008).

Someday, maybe we can discard all these myths, legends and folklore and try lawsuits under the rules.

Judge Randy Wilson is judge of the 157th District Court in Harris County, Texas. Judge Wilson tried cases at Susman Godfrey for 27 years and taught young lawyers at that firm before joining the bench. He now offers his suggestions of how lawyers can improve now that he has moved to a different perspective.★

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[1] I must confess that I've perpetuated this myth as a judge until I finally bothered to read some cases.