

FROM MY SIDE OF THE BENCH

Recent Bench Trials

BY HON. RANDY WILSON

RECENTLY, I TRIED SEVERAL SUBSTANTIAL BENCH TRIALS. Normally, judges prefer jury trials over bench trials. This preference is for a very simple, but perhaps selfish reason—when presiding over a bench trial, the trial judge is required to pay much closer attention to the evidence. Careful notes must be taken. The judge becomes the trier of fact and can't rely on the collective recollection of 12 jurors to remember the evidence and decide the disputed fact questions. These recent bench trials, however, were a pleasure to try. I was surrounded by good lawyers in all the cases.

In effect, I was a one man jury. I watched these trials from the same perspective as a juror. And, as I watched the evidence unfold, I discovered three improvements trial lawyers could make in presenting the evidence. If I had problems in these three areas, I suspect the lay jury would have the same problems to even a greater extent.

First, good evidence was lost or buried during the computer presentation of documents. In nearly every trial today, documents are presented the same way. Each side has scanned and digitized all the exhibits and has in the courtroom an eager computer technician poised to display each document on the screen. As soon as the lawyer asking the questions refers to an exhibit, it quickly appears on the screen. Any sentence that the lawyer asks about it quickly highlighted and enlarged. In all of these bench trials, hundreds of exhibits by both sides were displayed this way. After a while, this routine of document presentation has a numbing effect. Every document is displayed in the same fashion, regardless of whether it's a routine transmittal letter or the key exhibit in case. In other words, the really hot documents ended up being obscured among the blizzard of documents displayed on the screen.

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My suggestion? Every case has three or four key documents that you want to refer to time and time again. Go old school on those documents. Blow them up on foam boards. That way, when you're questioning a witness and walk over and pick up the foam board and ask a witness about it, the jury will perk up. They will know that this is an important document, perhaps in a different league than the myriad of other documents that have been shown on the screen.

Mix up the presentation of the evidence. It's a good way to signal to the jury that you're getting to something important and they should listen more carefully.

Second, I know this might sound strange, but after sitting through a trial for a week or two, you tend to forget the early witnesses. On several occasions during these recent bench trials, a lawyer would refer back to the testimony of a witness five days ago and I had to think for a minute to try to remember who that witness was. This was particularly true during closing statements. Give the jury some help. Show pictures of the witness. If you display some key testimony of the witness to the jury, either from deposition or trial, include a picture of the witness on the screen. You've been living with this case for two years and know the witnesses intimately. The jury hasn't. They just saw the witness for perhaps one hour in a video deposition. Five days later when you talk about Mr. Johnson's testimony, there's a good chance they've forgotten who Mr. Johnson is. Help remind them.

Third, in these bench trials I presided over, the chronology was often crucial. Yet, I often found myself flipping back through my notes to try to figure out how this witness's testimony fit with something else I heard yesterday. They

were both talking about something that happened in July, but was it the same year? Give the trier of fact some help on the chronology. Construct a time line of key events. Again, put it on a foam board so it's in front of the jury at all times. That way, the jury won't be struggling to make sure evidence is in proper time sequence.

As I said, these were problems I encountered from time to time during these recent bench trials. I suspect juries would have the same problems.

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. ★