

Overcoming Judicial Bias

by Stan Perry

You know you are in trouble when the transcript of your hearing reads like this:

Judge: Charlie (first name of plaintiffs' counsel), what do we have today?

Plaintiffs' counsel: Another motion to transfer venue the court needs to deny.

Judge: Why? Haven't I already denied similar motions in similar cases?

Defense counsel: With all due respect, this motion is different.

Judge: Well, who wants to waste my time by arguing this motion? You all know how I'm going to rule.

Defense counsel: I will not waste the court's time. The law has changed and this new law bears on the specific legal issue before the court.

Judge: Who has the order denying defendant's motion to transfer venue? Charlie, do you have one handy?

Most lawyers have encountered judges who appeared to be biased against them, their clients, or their causes. Although the kind of personal animosity described in Judith S. Stainbrook's partially tongue-in-cheek article *Strategies for Handling a Hostile Judge*, LITIGATION (Spring 2007), is fortunately rare, judges are no less human than anyone else, and neither their legal training nor their best intentions can completely eliminate biases and preconceptions from their thinking. Judicial bias may be conscious or unconscious and may take many forms. Over the years, I have learned to recognize various forms of judicial bias and developed some strategies for overcoming them.

One of the most common forms of bias, familiar to lawyers who practice outside their home jurisdiction, is the natural tendency of judges to feel more comfortable with lawyers who practice regularly before them and to view lawyers from afar with suspicion, if not hostility. Even if this feeling is unconscious, it can create a subtle or not-so-subtle bias in favor of the positions argued by the local lawyer who is your

adversary. This bias can be exacerbated if the local lawyer represents a client based in that jurisdiction. The best antidote I have found to combat bias against an out-of-town lawyer is to find the best local trial lawyer and hire her. More than likely, this local lawyer makes her living practicing before this judge, and you can gain instant credibility by associating yourself with a local favorite.

I am fortunate to serve as national counsel for an international petrochemical company's toxic tort docket. One of the joys of this sometimes challenging experience is working with excellent lawyers—some of whom actually try cases, lots of them. Believe it or not, the major cities in this land of ours do not have a monopoly on the great trial lawyers. They exist all over our country, and they are trying cases—sometimes monthly—in places like Crossett, Arkansas, and Angelton, Texas.

Too often, the approach to retaining local counsel focuses on who is perceived to have influence with the trial judge. Such a narrow view of local counsel is, in my humble opinion, a mistake. Instead of influence, I suggest you look for the best courtroom skills. If you get the best local trial lawyer, you can bet that this person will know the judiciary and that the judges will respect him. It has been my experience that even hostile judges appreciate excellence in the courtroom, especially excellence with a local flavor.

By retaining an outstanding local trial lawyer, you can strengthen your trial team by adding someone who is familiar to the local judge, especially if you make local counsel an active participant in your case from beginning to end. Too often a local lawyer is asked to do nothing more than file pleadings until it is time to pick a jury. This approach is, in my view, a mistake. Instead of having the local trial lawyer sit on the sidelines, get her into the field as soon as you can and make her an integral part of your trial team.

A recent experience highlights the difference between a local lawyer with influence and an excellent local trial lawyer. At a summary judgment hearing where I was representing the defendant, the local counsel for plaintiffs was obviously uninformed about the case. Yes, he had known the trial judge for over 40 years. Yet, he was unprepared to respond to our

Stan Perry practices law with Haynes and Boone, LLP, in Houston, Texas.

summary judgment motion and gave a half-hearted argument that grossly misstated key facts. Our local lawyer, on the other hand, knew the case, knew the law, and made a strong argument. Our side, therefore, had a distinct advantage over the other side because our local lawyer with influence was also an excellent trial lawyer, and their local lawyer was not, at least not on this occasion.

Take this situation and extend it to voir dire and opening statement. Do you want a local lawyer who knows the bailiff, court reporter, and judge but knows nothing about your case, or do you want someone who knows everyone, is a key part of your team, and will speak to the panel and jury in a familiar voice? The answer is obvious: Take the excellent local trial lawyer.

Another antidote to potential judicial bias can be summed up in a single word: Listen. This is so very hard for lawyers to do, especially trial lawyers. After all, we are God's gift to the uninformed and the last great breed of orators. Orators, however, must know their audience if they want to be great. Many times hostile judges will signal—if not flat-out tell you—what they do or do not want to happen in their court. Lawyers, however, are often too busy talking (or arguing) to pick up on these vital, and sometimes obvious, clues. Slow down and listen, and you may just learn something.

Recently, I was in a rural county in Texas before a trial judge who was not particularly receptive to the defendants' position. Let me rephrase this: He was not impressed in the least bit with the defendants' position. While the plaintiffs' counsel gloated and defense counsel pouted, the judge mentioned, in passing, that the trial date was firm and he was not going to continue the trial.

I honestly think that no more than a few of the 20 or more lawyers in the courtroom heard the judge. Well, I heard it—and I acted on it by crafting my discovery and trial strategy around the premise that the trial date was set in stone. In contrast, opposing counsel's strategy was premised on the assumption that this trial date—like most other first trial settings in toxic tort cases—was merely aspirational. This trial judge, although hostile to defendants in general, and to the defense position before him that day in particular, believed a trial setting is firm—no exceptions. By listening to his comment about the firmness of the trial date and incorporating it into our trial strategy, we were able to take a negative ruling from a hostile judge and turn it into an advantage for our client. When the trial date approached, we were ready, and our adversaries were not.

Another story highlights the additional benefit of listening: you may avoid giving the judge a reason to dislike you. Last year, I was at a summary judgment hearing before a federal district court judge in the Midwest who is not perceived to be friendly to defendants—and that is an understatement. I attended the summary judgment hearing with my very capable and well-known local trial lawyer. He was prepared, and so was I. Our plan was to divide the argument between us, with the local lawyer starting our argument and me finishing it. Five minutes into the hearing, however, two things became obvious: (1) the trial judge was curious about who I was and why I was there, and (2) he really liked and admired our local lawyer.

What did I do? I never opened my mouth. To this day, the trial judge may think I am the local lawyer's associate. No, we did not win the motion, but we had a fair hearing, and it

revealed some serious problems with the plaintiff's case. The case, not surprisingly, settled later on favorable terms.

I could have demanded that I get to argue part of the motion and explained to the court that I have handled numerous cases like this one and they never have any merit and blah, blah, blah. My argument, however, would have forced the judge to defend his home turf and the local plaintiffs' lawyer. Instead of that scenario, the court was entertained—I think he actually enjoyed the argument—by two excellent local lawyers arguing about the meaning of law outside his circuit and whether it should or should not apply to our case. Had I interjected myself into this hearing, the tone and context would have been dramatically different.

The moral to these stories is that even a hostile judge can give you an advantage if you will simply stop talking, pay attention, and listen.

Another strategy is to get another voice. On occasion, you hire the best local trial lawyer, listen attentively, but the judge is still hostile, if not downright mean-spirited. In this scenario, it is time to think like a baseball pitcher. If the batter is constantly hitting your fastball, a good pitcher moves to another pitch—preferably, something the batter is not expecting like a change-up or curve.

Hostile judges may have similar weaknesses. One of the reasons some judges are hostile, especially toward out-of-town lawyers and particularly toward big-city lawyers, is that they are tired of arrogant, conceited lawyers marching into their courtroom and explaining how things are done in Dallas, Los Angeles, or New York. The truth is this local judge does not care. He has a courtroom to run and a docket to manage, and has done just fine without the bright lights of the big city. In this scenario, it is time for the trial team equivalent of a curveball or change-up: Have your youngest member of the trial team make the argument. Her fresh approach may eliminate some of the tension, and even resentment, the judge has toward the out-of-town, know-it-all lawyer. The young lawyer's argument can sometimes catch the hostile judge off balance, just like a good change-up. On more than one occasion, I have seen a hostile judge go out of his way to help a young lawyer argue his position. The judge who snarls at the experienced lawyer becomes, somehow, the judicial equivalent of the aunt or uncle trying to mentor a favorite niece or nephew.

Yes, this strategy requires the more senior lawyer to step back and let a more junior lawyer handle the issue, which seems counterintuitive because, after all, this is not just a judge; it is a hostile judge. But if the desired goal is the best result for the client, speaking with a new voice may be just the strategy that will work.

Sometimes the best victory is the one that is never fought. I am not sure, but I am fairly certain, that President Dwight D. Eisenhower coined this statement; if not, he should have. I am still amazed at how many times lawyers demand to have their day in court when they have a pending proposal from the opposing side that is better than their best possible ruling from the court. It is almost as if the lawyer would rather lose in front of a hostile judge, even if this is inevitable, than reach an agreement with the other side. It is, therefore, imperative that you work, and work hard, to reach an agreement so that you can avoid these guaranteed losses.

There is no dishonor in reaching an agreement with the opposing side that might be better than a result you would get from the trial judge. In fact, the opposite is true; there is honor in working

to get the best possible result for your client by agreement and avoiding the risk of appearing before a hostile judge. A benefit of this approach is that sometimes even the most hostile judge will appreciate your efforts to avoid a hearing. I appear somewhat regularly in front of a trial judge who is no friend of defendants or the defense bar. He does, however, really appreciate it when counsel, especially defense counsel, have done everything possible to eliminate the dispute and avoid the need for a hearing. This is particularly true when the dispute is over discovery. Discovery disputes are to judges what children fighting over broken toys are to parents: unnecessary racket. Even a hostile judge may reward your efforts to avoid making him hear a discovery dispute by being more receptive to your argument on substantive issues.

When all else fails, you must plan for the mandamus or appeal. Yes, sometimes all of the tried-and-true strategies for dealing with hostile judges just do not work. When this occurs, plan ahead by framing the issue so that if the judge rules against you, you have a record you can take up by mandamus or appeal. This is lawyering as a high art form. You are taking your loss, which is as sure as the sun coming up in the east, and turning it into a possible win or, at worst, giving the judge a warning that his or her conduct is subject to review by the court of appeals. If you play your cards right, the hostile judge may even make—you guessed it—a hostile statement on the record that gives you a perfect lead for your appellate brief. You can then use the zinger from the court—such as in the introduction to this article—to demonstrate to the appellate court that your client is not getting a fair shake and the trial judge is biased.

Even if you lose the mandamus or appeal, your effort may ultimately reduce the judge's hostility. It has been my experience that most hostile judges do not think they are being hostile; rather, they have busy dockets to run, they are tired of arrogant and insulting lawyers, and, often, they are just bored of the same old thing, day in and day out. Seeing their behavior in black and white can, occasionally, take the edge off of a hostile judge.

Planning for the appeal, however, is hard work because it requires forethought and a commitment to take your beating for the good of your client. Too often, trial lawyers want instant results. By focusing on the appeal, the trial lawyer is making a commitment to ride out the storm and see to it that the upper court has a chance to correct and curtail the hostile judge. It is far from instant gratification, but it can be very gratifying to see that, in the end, justice does prevail.

In dealing with a hostile judge, it is necessary to persevere. Sometimes a judge is hostile because he wants to avoid hearings or disputes, and one way to do this is to make sure that neither side wants to appear before him unless absolutely necessary. If you cannot get an issue resolved and judicial involvement is necessary, then stand strong and do not let the hostile judge intimidate you. After a while, the hostile judge will, grudgingly, grow to respect your perseverance, especially if your persistence is always professional.

I have seen hardened, hostile judges worn out by docile, introverted attorneys who refuse to go away and refuse to give up. It takes, however, a very special touch because pursuing the same argument the same way can quickly lead the court to perceive your persistence as disrespect of the court's authority. One example of professional persistence is requesting individual trials of the plaintiffs in multi-plaintiff cases. A good defense lawyer knows that individual trials are both critical to the defendant's right to a fair and impartial jury and something the trial court will not want to accept. After all, individual trials mean more

trials, more hearings, and a more congested docket. The gifted trial lawyer, however, raises the issue of individual trials at each opportunity—in connection with the scheduling order, decisions on which plaintiffs to depose first, the scheduling of experts and the challenges to experts—but does so in a manner that is both respectful to the court and germane to the issue before the court. The key here is to persevere but not bore or offend the court.

If you are not careful, however, persistence before a biased judge can turn you into the legal equivalent of the Washington Generals. You may recall that the Washington Generals are the foils for the antics and victories of the Harlem Globetrotters. Each day the Washington Generals put on their uniforms, play in front of a hostile crowd, and get humiliated by the Globetrotters. This is not what any of us aspire to.

There is, however, satisfaction in persevering in a professional manner. We all know how to win; we all know how to pout or cry if we lose. The real lesson is learning to lose in a dignified and professional manner. Contrary to the examples we often see in presidential debates, losing with dignity does not mean making faces, rolling our eyes, or sighing in exasperation. Rather, a professional picks up his or her materials, shakes hands with the opposition, acts as if the ruling for the court was exactly what was anticipated, and, of course, plots to appeal the ruling all the way to the office.

One of my hobbies is coaching youth sports. It is a world I grew up in because my father is a retired coach. As a result, the baseball field or basketball court always feels like home to me. For the teams I have coached, I always stress the importance of learning how to lose. Don't get me wrong: We work hard and try to win every game. But, as in life, what you want and what you get are not always the same thing. Therefore, I try, in earnest, to teach my teams how to lose and how to learn from losing. You learn from losing by focusing on what you did right, what you did wrong, how to keep doing the things you did right, and how to avoid doing the things you did wrong. For example, if you

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lost a baseball game because your players struck out too many times and most of the strikeouts were on called third strikes, you focus on this issue at your next practice. One means of driving home this issue is to have an intrasquad scrimmage and have each player enter the batter's box with a count of no balls and two strikes, so that the batters must not take close pitches and they've got to be aggressive at the plate.

The same is true for trial lawyers in front of hostile judges. Be a professional. Be careful not to lose your integrity when you lose a hearing. Whatever you do, do not return a negative ruling or attitude from a trial judge with a negative comment or attitude. Rather, try to raise your professionalism each time the court is hostile. And self-reflection is important: what did you do right, what did you do wrong, what can you do to cure these mistakes, what other approach should you take with the court? If you can remain a professional, act with dignity, and learn from your losses, you will leave the courtroom with honor and dignity, and you will, eventually, overcome this judicial bias. □