

The Judges' Benchbook – www.utlitsec.org

by Francis J. Carney

A few clicks of your keyboard and mouse are all that stand between you and the inside information that used to take trial lawyers years to acquire. That judge before whom you are to argue that motion tomorrow has some definite thoughts on how oral argument ought to go. Here's your chance to find out what they are and avoid the embarrassment of a new lawyer's "learning experience." Go to the Utah State Bar's Litigation Section's web page, www.utlitsec.org and, once there, to the "Judges' Benchbook" and find out.

... To be quite honest, as a whole in Utah, I think we have a great group of lawyers. ... I think lawyers – I don't know what they teach at the law school, sometimes I think they hammer home this advocacy thing so much that lawyers kind of lose sight of what their job is and this is to represent their client in a professional manner and in a dignified manner and I think as an officer of the court you have an obligation to conduct yourself in such a way that it not only makes our job as judges easier, but it makes the system work better than if you are fighting or making snide comments. I had a trial a couple of weeks ago where the two lawyers did not get along very well and so one lawyer would say something and the other one was grinning and cackling and stuff like that should not go on. Even if you don't like the lawyer on the other side, I think you have to maintain some dignity in a courtroom.

– Judge Bill Barrett

For years lawyers have been bemoaning the perceived loss of collegiality among the bench and the bar, especially in the Third District. Some of this is due to our new fortress-like courthouses with the judges monkishly cloistered away in back when not on the bench. For good or ill, no more the easy familiarity of the "lawyers entrance" into the judicial corridors. Judges, for their part, see an unending parade of new faces from the bar. The growth in the number of lawyers and the need for increased

courthouse security has meant that lawyers are far less familiar with the judges and the judges with them. We have many new lawyers who do not have the advantages of practicing with mentors and of thus acquiring the intimate knowledge of judges' preferences that once was commonly passed along in that way. In short, there's a growing knowledge gap on courtroom practices between the bench and the bar.

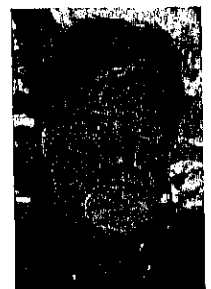
The Litigation Section has attempted to do something about it. We decided to ask each state and federal trial judge about their courtroom preferences, their attitudes about effective advocacy, their likes and dislikes, their tips for the new lawyer. Our plan was to put all that information on a web site freely accessible to all judges and lawyers.

It has not been easy. We started by sending out nearly one hundred questionnaires to the judges and we received only a few responses.¹ We then met with the Board of District Court Judges to encourage participation, and got a few more responses. The judges of the Fourth District were kind enough to meet with us *en masse* at one of their monthly luncheons.²

We then undertook to interview the judges personally, every one of them. The threat of interviews prompted more questionnaires to be returned. Interviews were conducted with several dozen judges, transcribed, and put on the web page. We now have online interviews or responses from about a quarter of the sitting trial judges and are in the process of tracking down the rest.

The interviews and the responses range from the terse to the expansive, from mundane recitations of policies to wide-ranging

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discourses on effective advocacy. In our interviews we talked of many things of interest to the advocate: How does jury selection work in your court? How do you handle case management orders? Do you bother with mediation? When do you want to get proposed jury instructions? How and when do you decide on what jury instructions will be given? What rules do you have on counsel's courtroom movement? Do lawyers use the new courtroom technologies effectively? What do lawyers do that's persuasive in jury argument? What do they do that annoys jurors? What do they do that annoys you? Do you bother with requiring permission for overlength briefs? What's persuasive in written motions? What does the clerk want to tell lawyers? What do you want to tell lawyers about effective advocacy? And many others.

We've promised the judges the opportunity to edit and "clean up" the transcribed interviews and many have done so. We've also encouraged comments from the courtroom clerks. And we've told the judges that the web page is theirs to change or to add to as they see fit.

No project of the Litigation Section has generated more interest than this one.³ Over five thousand hits a month are consistently registered on the Litigation Section's website and much positive feedback has come from the members of the bar.

The judges' contributions have been fabulous. For example, Judge Taylor of the Fourth District submitted a nine-page response describing his courtroom practices in detail. It would be foolish for an advocate to appear in that judge's courtroom without taking the time to read it. Judge Tim Hanson's wide-ranging interview gives the perspective of twenty years on the bench about effective trial lawyers. Judge Eves of the Fifth District has provided a thorough but concise guide to practice in his court in Parowan.

Ideally, we'd like each judge's portion of the web page to be an opportunity to address the bar. A judge shouldn't have to tell each new set of lawyers about his or her policies, nor should the clerk. Instead, they should be able to point counsel to the Benchbook for all the necessary information. And likewise no lawyer should be forced to go cold into an unfamiliar judge's courtroom.

We have incorporated other sources of information on the judges when available. For example, the Utah chapter of the Federal Bar Association publishes excellent "Judicial Profiles" on our local federal judge, and the FBA has generously granted us permission to republish those profiles on our web page. Take a look at Judge Dale Kimball's page in the Benchbook – it includes not only his response to our own questionnaire, but also a link to the District Court's web page and his recent "Judicial Profile" from the

Federal Bar Newsletter.

Some responses were surprising; some entertaining; some predictable. But most are well worth reading.

I have made two observations. One is a short, clean presentation is more effective than a lengthy one.

The second is that juries are collectively extremely erudite and observant. Counsel need not say something multiple times for the jury to understand a point. If jurors have a common criticism it is that lawyers beat a dead horse. Counsel can put on a case simply, cleanly and efficiently and be confident the jury will hear it, understand it and render a fair verdict. Hammering the same points on and on can do more harm than good

– Judge Bill Bohling

There is wide variation in how judges feel jury voir dire should be conducted. One view, exemplified by Judge Darwin Hansen of the Second District, allows some involvement of counsel in the questioning:

I will conduct the initial voir dire but I will allow follow-up questions by counsel. Counsel should understand

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that the purpose of voir dire is to expose potential bias and not to argue the case, gain commitments, or attempt to ingratiate counsel with the panel. Attorneys who attempt to misuse voir dire will be immediately cautioned and thereafter cut short. Generally jury questionnaires are not used in my court but if the case is unusual or the nature of the case suggests that jury questionnaires would be helpful then I will consider their use upon the request of counsel.

Others hold to the "federal" view that jury voir dire is to be conducted by the court, with suggestions of counsel:

Counsel and I do jury selection. Voir dire examination by counsel is done through the bench to give opposing counsel an opportunity to object.

— Judge Dennis Frederick

There were useful comments on the difference in approaches in jury and bench trials, for example this one from Judge Philip Eves:

Attorneys should treat bench trials like jury trials without the jury instructions. It is particularly ineffective for an attorney to present a vast collection of facts and

then assume that the court will develop a legal theory for the case. The lawyer should have a theory in the case and should make that clear to the court so the court knows what it is being asked to decide. The lawyer should be prepared to cite the law supporting his or her client's position.

— Judge Philip Eves

Some judges questioned the need for a separate interview with each judge for the reason that the remarks would soon become repetitive. There are, in fact, certain common themes that seem to resonate with each judge. Many have expressed comments along these lines:

I love a lawyer who has the courage to say "no questions" and sit down because what that tells me is that the lawyer thinks that testimony is pretty near worthless, it does not need to be attacked.

You mention impeachment, I seldom see depositions used correctly. I see people drag that deposition like a club. They try to start with the deposition instead of asking the question and getting an answer and if necessary going to the deposition but like some of the

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other stuff that we have talked about, I think is much more effective if it is saved for an important issue.

If you get somebody that does not answer each question the same way they did twelve months ago in their deposition and see that dragged out question after question after question, again it becomes pointless, it aggravates the jury and aggravates the judge. Depositions should be used sparingly and when they can be used devastatingly. . . No cross at all can be very effective.

— Judge Steve Henriod

Courtroom professionalism was another issue that came up frequently:

On the issue of civility, we talk about this a lot but, the lack thereof continues. I see it in briefs. I read a brief just the other day where there were all kinds of adjectives vilifying the other side for not doing what the person writing the brief thought they ought to do. That is inappropriate. I get the message without those kinds of adjectives.

I see more than I should in oral argument where one lawyer will accuse the other of making a misrepresentation or false statement. You don't hear the word "lie" very often, but I hear the words misrepresentations and misstatements. Don't accuse another lawyer of a lie unless you can prove it and you better be able to prove it beyond your own statement. I take that seriously, if a lawyer made an intentional misrepresentation then that lawyer's credibility in front of me is history.

— Judge Tim Hanson

[A]s a lawyer, your word ought to be your bond. You ought not to have to, and I had a father-in-law that always said to me, "Bill, the best friend you have is that lawyer on the other side because win, lose or draw in a case that you have at that moment in time, you are going to run into that lawyer again and if you make an enemy out of that lawyer, you are going to make your life miserable and it is not worth it." And I have always tried to practice that way and I would hope that most lawyers would. I recognize that there are some that are just so difficult that is hard not to want to retaliate, so to speak, but I think that if you go in with the view that when I say something to a lawyer they can take it to the bank, they can rely on it, I think

that is crucial in the practice of law.

— Judge Bill Barrett

In an attempt to cover the basics and avoid repetition, we have included several articles on general pointers for courtroom conduct, including "Tips from Courtroom Clerks," "Fifty Tips From the Bench," and "How Lawyers Can Write More Persuasively For Judges."

Overall we found that there were enough differences among the trial judges to justify individual interviews with each of them. Those differences range from the minor (some of the judges despise courtesy copies of motion papers; others demand them) to the significant (some conduct final pretrial conferences as mediations; others treat the pretrial as a meeting on the technical aspects of the upcoming trial.)


We expect the Judges' Benchbook to grow in usefulness as more judges sign on and more lawyers use it. We'd appreciate your comments and suggestions. If you're a lawyer, give it a try. If you're a judge, call us for an interview or a questionnaire and we'll have you online in no time.

¹The bankruptcy judges declined to participate. Letter of William C. Stillgebauer, Clerk of Court, to Francis J. Carney, February 8, 2000.

²Unfortunately we have only one response to date from the Fourth District, that of Judge James Taylor.

³The Litigation Section is the largest voluntary section of the Utah State Bar with over a thousand members. As well as its popular web page, the Section sponsors frequent CLE sessions on civil litigation issues, puts on the popular "Trial Academy," publishes the Model Utah Jury Instructions, among its many activities. For further information, contact the Section at litigationsec@utahbar.org.

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