Employing the Judge

By Nelson Miller

One of the oddest and frequently overlooked dynamics in a jury trial is that the most powerful person in the courtroom largely stands on the sidelines unless deployed by counsel.

Of course, the power of a jury trial lies exactly in the fact that private citizens who know little about judging decide outcomes. In a jury trial, the judge—whom citizens have elected or another public official has appointed to control the courtroom—sits silently, for the most part.

The U.S. Constitution's Sixth and Seventh amendments and the Michigan Constitution's Article I, Sections 14 and 20, enshrine this odd dynamic because juries represent a community judgment and check on the trial judge's power. Yet juries also produce highly uncertain outcomes. Consider as evidence that trial lawyers generally don't tell clients who is going to win. They instead give probabilities, saying, "If we were to try this case 10 times, we'd win it in eight or nine of those trials." When the other side wins, you just got the anomalous jury.

As an example, I've won a plaintiff's case in which the judge, defense counsel, and court reporter took bets on how quickly the jury would return with a no cause. Gleeful defense counsel was ready to collect on the bet when the jury came back in only 15 minutes. Then the foreperson read the plaintiff's six-figure verdict.

As another example, I've won a medical malpractice case on liability but with a no-damage award—which everyone knows is an utter loss—despite abundant damages proofs and when the defense had not even argued about damages. Go figure. Juries are unpredictable.

Judges, however, are significantly more predictable because they are trained in and bound by the law. They are also usually already on the record with multiple decisions in the case to be tried, along with at least a few on- or off-the-record intimations of what they think of the case. Trial lawyers usually have a very good read on the judge, even if they have little or no read on the jury.

For example, I tried a case against plaintiff's counsel who, until the trial judge had recently taken the bench, had been the judge's longtime law partner. They knew one another well—far too well for my liking. Unfortunately, most experienced trial lawyers know what it's like to try a case against opposing counsel *and* the judge. Doing so usually doesn't bode well. I lost.

Given the predictability and power of a trial judge, I've found it surprising that we don't more consistently employ and deploy judges in our trials, particularly when we know or suspect that the case would dispose them to rule in our favor.

One reason for the reluctance to call the trial judge into battle has to do with the judge's understandable haste to advance the backlogged docket. Every trial lawyer knows the judge's diversionary routine to burst into the early morning courtroom calling for the jury even before sitting down at the bench, hoping that counsel won't delay with mid-trial motions and arguments. While we should respect judicial resources and efficiency, we should also resist sacrificing important rights to a fair and orderly trial simply because the judge is in an understandable rush to proceed.

Trial lawyers have two general ways to invoke the judge's authority: keep things from happening, and fix them when they do. Pretrial motions in limine that MRE 103(c) and 104(a) impliedly authorize and caselaw[1] explicitly recognizes begin the process of controlling the proceedings. Yet just because you obtained a pretrial order excluding certain evidence or prohibiting certain arguments doesn't mean you won't have to do more of the same during trial. At the end of every trial day, review what's coming—especially including new matters that arose only at trial—to see if you need to show up early the next morning with a new or renewed motion for hearing outside of the jury's presence, as MRE 103(c) and 104(a) encourage. Cite MRE 403 on excluding relevant

> Jurors usually have great respect for judges. What the judge says at trial may only be advisory, but judges still influence jurors, not only through rulings but also in hints and leanings.

"Trial Practice" is a regular column of the *Michigan Bar Journal*, edited by Gerard Mantese and Theresamarie Mantese for the Publications and Website Advisory Committee. To contribute an article, contact Mr. Mantese at gmantese@manteselaw.com.

evidence for prejudice, confusion, or waste to call the trial judge into action on your side of the cause. Who knows—maybe the knight will win you a battle you had expected to fight alone.

Also, when something happens at trial that should not have happened, whether the subtle skirting of a pretrial order in limine or the surprise injection of a new issue and new evidence that never should have seen the trial's light, cite MCR 2.516(B)(2)[2] to call on the judge to correct and clean up the mess.[3] Resist the temptation to fire back at opposing counsel with your own anger and frustration. Instead, call on the trial judge to enforce pretrial orders and follow rules of evidence.

As trial counsel, you play an important role in controlling the proceedings simply by calling or cross-examining witnesses and making or eschewing certain arguments. But don't take on the trial judge's role while the judge figuratively sleeps. Give the judge that privilege. As trial counsel, one of your greatest abilities is calling on the judge to use his or her power. If you don't do so, the trial judge may have no real opportunity to control the proceedings as he or she may in fact wish.

Deploying the trial judge's power may take a little more than just rising to object. Help the judge. Get someone back at the office to research and write a quick brief on the disputed issue or do it yourself after the day's proceedings, thoughtfully guiding the trial judge through new or difficult issues. I've seen it done and also occasionally done so myself (although not as often as I should have) to good effect.[4]

Lawyers have one other interest, though, in their relationship with the judge during trial. Jurors usually have great respect for judges. What the judge says at trial may only be advisory, but judges still influence jurors, not only through rulings but also in hints and leanings. We all have likely experienced the feeling that a trial judge seemed all too happy to agree with opposing counsel while ruling against us with great relish in front of the jury.

You have two choices for countenancing a trial judge's attitude toward your case in front of the jury and in the face of the judge's probable influence: you can stand with the judge or against the judge.

The majority of us wisely try to stand squarely with the judge most of the time, even when he or she is ruling against us. Isn't that why we tend to thank the judge even for adverse rulings, hoping the jury will think we are winning? Lawyers are generally wise to accord the judge the greatest deference and respect throughout trial. After all, we draw our own respect and limited authority from the trial judge and the courtroom and court procedures that the judge controls. Jurors know that the courtroom is the trial judge's, even though we may try to make it our own.

The trial lawyer who stands against the judge—trying to turn the jury members against the judge and recruit them to a cause that the judge's rulings indicated was losing—runs a great risk. I've seen it done successfully only twice, and both times at the cost of an ultimate loss. In both instances, opposing counsel clearly believed the case was lost because of the trial judge's rulings excluding evidence and arguments yet referred to the excluded evidence and made prohibited arguments anyway, ignoring and even appearing to mock to the jury the judge's growing admonishments.

While the ploy in both cases resulted in favorable jury verdicts for the renegade counsel, the judges in both cases promptly threw out the verdicts in post-trial motions. The appellate court upheld the rulings rejecting the verdict in both cases. In the long run, justice was done.

So stand with the trial judge's authority. Invoke and deploy the judge's power. Don't leave the courtroom's greatest figure standing on the sidelines. Call the trial judge into the competition on your side's behalf. The other side will do so, even if you don't. ■

Nelson Miller is a professor and associate dean at WMU–Cooley Law School and civil litigator who tried his first jury case nearly 30 years ago. He has published more than 30 books on law and legal education including, most recently, Going to Law School: Preparing for a Transformative Experience *and* How to Get a J-O-B: An Eight-Step Program for Lawyer Employment. *He has also published casebooks on civil procedure, torts, and professional responsibility.*

ENDNOTES

1. See *Lapasinskas v Quick*, 17 Mich App 733; 170 NW2d 318 (1969) (recognizing and defining motions in limine).
2. "At any time during the trial, the court may, with or without request, instruct the jury on a point of law if the instruction will materially aid the jury to understand the proceedings and arrive at a just verdict."
3. See, e.g., *Ykimoff v Foote Mem Hosp*, 285 Mich App 80, 107–109; 776 NW2d 114 (2009) (discussing curative instructions), citing MCR 2.516(C) ("[a] party may assign as error the giving of or failure to give an instruction only if the party objects on the record").
4. See *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 386–387; 651 NW2d 756 (2002) (trial court dismissed claims on day of trial based on trial brief's argument).