



From Hon. Jacqueline Connor (ret.)



WHAT ONE DAY ONE TRIAL MEANS TO YOU

(Are you paying attention?)

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Have jurors changed with the advent of One Day One Trial? Has the character of jury trials been altered? Did ODOT “fix” something that wasn’t broken?

In the view of at least this judge, I believe the change has been profound. I also believe this has been a good thing. One Day One Trial has altered the dynamics of jury service by its essential goal: everyone serves. That includes you. I personally do not believe that there has been a shift in the quality of verdicts, though I have seen no hard statistics. In my court, at least, when the facts support it, jurors give big. When the facts don’t, they are equally quick to drop the hammer. They can usually figure out the difference pretty accurately.

ODOT has, however, resulted in a shift in how one ordinarily does business. Or at least it should, for litigators paying attention. For those who are not paying attention, they fail to do so at their peril.

The transition to a one-day term of jury service began with limited districts in May 1999. The entire county was on board by May of 2002. We now have a history of almost five years at this point where every court has been impacted and any litigator doing a trial in the last five years has been part of this new dynamic. What is amusing to me is that five years seems to always work out to just about enough time for no one to remember how things used to be. This may be truer in criminal than civil, but I think it still fits.

For those who don’t remember, it was not so long ago that jokes were the standard of the day. The bottom line was that if one was too stupid to get out of jury service, then one deserved to sink into the bowels of the justice system. There were discussions on radio and television talk shows about how to get off and tips on what to say to avoid the dreaded obligation. Having fielded calls on such shows and taken questions from the public for over twenty years, there has been a refreshing change. Instead of steeling myself for the expected gauntlet of invectives and horror stories, I am now greeted with a flow of inspiring stories. Have I noticed a difference? You bet.

Some of us may remember when service was for thirty days. That was before it was reduced to ten days

then five days then back up to ten days. (If you don't know why this happened, don't ask.) These periods of service have nothing to do with the length of a trial, of course. The terms of service only dealt with the number of days people had to vegetate in assembly rooms and courtrooms waiting to see if they might get on a jury. Of course, anyone who made the slightest effort could get off with the flimsiest of reasons. Some of us remember when jurors were regularly recycled on one trial after another, with the latter parties being stuck with experienced jurors who had heard all the "stories" before and were less likely to be impressed by anybody, armed with their newly acquired cynicism.

As a trial lawyer thirty years ago, I remember the process of evaluating all the postal workers on the panels. Other than the unemployed and retired, they were usually the only ones who could stay and be paid, and many of them wanted to be there so they did not have to return to work. I recall when jurors would be ecstatic with short work days, long drawn out trials and Fridays off. It meant no work, for surely their service on a jury was not work. It was a reprieve. It was a vacation. It used to include lunches and other perks. Sometimes it included hotel stays.

Our system is far from perfect, even with the changes that we have seen with the alteration in the term of service and with all the ongoing efforts to improve the experience from the jurors' perspective. It is still the best in the world, and better than ever with ODOT. The biggest change is one that we all could have anticipated. People are serving who have never served before. The proportions have been completely reversed. I used to see about 10% of each panel comprised of new jurors. At the beginning of ODOT, I saw 10% veterans and 90% first timers. I see about 60 – 70 % newcomers with each trial even today.

With this has come the result that those of us who care have looked forward to. People's views of jury service are being altered, one trial at a time, one juror at a time. Those who don't serve have always been our harshest critics. Those who actually serve become our staunchest advocates. We are now getting more advocates. You are now getting more advocates! I am seeing an increase in respect for the system. I am seeing more confidence that the system works. I am also seeing a growing respect for trial lawyers and the value of the work they do. I am universally seeing recognition that things are not as simple as they look in the news. This is good for the justice system, and it is good for the legal profession.

Can I bore you with a few anecdotes from one court (ok ok, it is my court... didn't think I could fool you)? A partner in a law firm did his utmost to explain how busy he was, how he did pro bono work and served on the board of a law school plus had demanding clients and _____ (you fill in the rest.). After bombing with me, the trial lawyers unfortunately did not respect his wishes to be excused and

he served through the trial. After the verdict came in, he repeated his mantra, though not as vociferously. He should never have been made to stay yadayadayada. After some days had passed, I wrote a letter to him and asked him, with some time under his belt, whether his views had changed. He wrote back to me that his perspective on lawyering had indeed been impacted. He felt he was a better lawyer, a better mediator, a better trustee and a better partner, and thanked me for not letting him leave. Whew.

One newly minted citizen tried to get off service, feeling a lack of confidence in his ability to keep up. He stayed. After the verdict, as the jurors gathered for questions, he had us all nearly in tears as he spoke of his pride in having been part of the system, that he had been overwhelmed to have his opinions respected by the other jurors, and that this would never have happened in his home country.

One young woman who worked in a clerical capacity felt so empowered by her ability to hang in there with the big guys and hold her own, that she decided to go back to get a degree and get out there in the world she had been viewing from afar.

These stories are neither unusual nor rare. What is also not rare is the zeal and seriousness with which I see jurors approaching their task. They really want to know what is going on and they want to understand what is being presented. They really want to do the right thing.

Hence, the part about where trial lawyers really need to pay attention. Jurors do NOT want their time wasted. They do NOT want to get out early only to come back for a protracted trial. They do NOT need to hear information repeated ad nauseum, in case they missed it the first fourteen times. They DO want to start on time and end on time. They DO want to be able to see the exhibits. They DO need the legalese translated. They DO want their questions answered.

There is a lot we cannot give them. One very articulate and intelligent foreperson in a mega publicity trial of one our most celebrated corporate scandals, told me that he could not understand why, in this day of computers and high tech gadgets, he and his fellow jurors could not get a transcript of the hundreds of hours of testimony they endured. Some things will never be made available, but what we can provide and often don't, is simple respect.

What does that mean to a trial lawyer in 2007?

Give them the tools to do their jobs.

Don't be afraid to let them ask questions. Their questions are your friends! They are golden opportunities to address concerns or correct misunderstandings that otherwise will be left to their imaginations. You think you already covered it? Think again.

Don't repeat ad nauseum. The old wisdom was that if it was important, you needed to repeat it. Don't believe it. I repeatedly see jurors swarm to the side of the trial lawyer who asks what is needed, sits down and crafts what he got from the witnesses and evidence into a focused, hard-hitting argument. These are the lawyers who get asked for the business cards. Every time.

Flush out the biases and concerns right up front with miniopening statements. Give them your view of the case in the first minutes of the trial, before voir dire, so they know what is coming and know what will be expected of them as judges. Leaving the judge to give the sanitized statement of the case is bad lawyering. Having personally been a juror in some panels and listening to a few of those "statements", in each instance I had no better information about what the trial was about than when I walked in the door with the rest of the panel.

Don't waste their time. Don't run out of witnesses. Have your witnesses ready and waiting or work with opposing counsel and the court to switch orders if schedules can't accommodate the ideal chronology. Don't ever be late. Better to be late for the judge than your jurors.

Stand when the jurors come in and out. I have had many jurors tell me after a trial that they thought the plaintiff's lawyer or the defense lawyer respected them more than the opposition because they stood when they entered and the other side was otherwise distracted and did not notice.

Give them copies of the most critical pieces of evidence so they can see them up close and at the precise time that they are being examined by the witnesses and fought over by the attorneys. These can go into jury books, which are inexpensive and raise the level of professionalism of the whole operation when provided. (Only the most critical pieces. You can do more damage by giving them too much extraneous paperwork. Most won't look at them or some might flip through and misread a juicy tidbit out of context that can destroy all your best efforts.)

Make sure they have their own copies of the jury instructions so they can read along when the court recites them. We know that people learn at different rates and in different modes and we know that multiple forms of information increase rates of comprehension. Having them read along will make your job easier, and will also allow you to refer them back to the choice words that are most helpful to you by

directing them by page and paragraph in your argument. Seeing it in black and white is understanding. Jurors often report back that having their own copies gave them the opportunity to review what may not have made sense initially, and also let them reign in the occasional juror who wanted to go off in a direction none of the parties anticipated.

Unless there are no alternatives, make sure that the judge does not leave the jurors out in hallways. Many cases are lost, totally unbeknownst to the parties, because of an inadvertent observation by a juror. In one premises liability case, the defendant was seen tossing the wrapper of a piece of gum on the ground outside the courtroom. To the extent that evidence was presented of carefully monitored safety practices, none of it meant anything. The case was over. This could happen to either side at any time. You'll never know. Don't let it happen.

If the trial is a long one, or has a significant break in the middle (such as with a three or four day weekend), ask the judge give you a chance to bank some minutes for interim summaries. These are not arguments. They are chances to let the jurors know where you have been and where you are going. They will eliminate the urge to repeat everything that was presented before the break. (That will be your winning argument with the judge. Trust me.) If interim summaries are not in the cards, another inexpensive strategy is to introduce each new witness with a single neutral sentence letting the jurors know why they are there.

Does your case involve a series of events? Give the jurors a break and make them a timeline. This is particularly helpful in medical malpractice and construction defect cases.

Be polite to the other side. Don't object to everything. Objections are a lose lose proposition for you. If you win, it looks like you are hiding something. If you lose, you are a loser. If it is important, fight it out in advance before you pick your jury and don't waste trial time with sidebars. Acknowledge your weaknesses. Nothing will gain you more credibility. This applies to your experts especially.

Ready to stretch? Consider stipulating to letting jurors talk with each other throughout the trial. Arizona has been doing it for years. It has NOT given an advantage to either side, according to every study and oversight that this innovation has generated. It acknowledges what we all know. Jurors DO talk to each other throughout the trial. What it does do is to knock out the surreptitious formation of cliques, it reduces the amount of improper talking jurors do with outsiders such as family or friends, and it allows them to correct or understand the evidence so that when deliberations actually start, they don't have to start figuring out what happened.

None of these points cost a dime. But they do mean you must pay attention and you must know where you are going before you stand before that panel of citizens who, these days, could include someone like your doctor, your sister, your lawyer, your personal trainer or your spiritual advisor.

One Day One Trial? I think Mikey likes it!

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