



*From Hon. Jacqueline Connor (ret.)*



## JUDGES AS JURORS: THE BENCH

### WE DON'T WANT NO STINKING JUDGES!

Jury duty constitutionally applies to everyone. Thoughtful arguments have been made, however, that we should not serve as jurors because of the potential for inordinate influence, that we create an untenable and unpredictable problem for litigators when we sit as “super-jurors” because we know too much, and that we do more for the justice system and the public by doing our jobs and not sitting in assemblyrooms or someone else’s courtroom.

When I first started pulling together research for an article exploring the impact of judges serving as jurors, I received a slew of responses across the state that judges were not actually serving on juries. I also received long lists of judges who were summoned, but as soon as they stepped into the courtroom, they were excused by stipulation or fiat...everyone agreed to dump the judge before the game even started.

We all know one of life’s rules, akin to Murphy’s Law, that a jury summons only shows up on our radar screens when it is really really REALLY inconvenient. As I tell jurors all the time, if you volunteered and were available, we can’t use you. So, keeping in mind that jury service is never convenient for neither bench officers nor 95% of the public, do we have a role there? Should we have a role? What really does happen when, shock, one of us is left on the panel?

Is it true? Nobody wants no stinking judges?

Exploring these questions with judges across the state with added input from out of state judges, I have seen confirmation that the presence of judges, even when only in assemblyrooms, serves as a powerful statement of the inclusiveness of everyone in the obligation, responsibility and honor of jury service. Judges’ time, as important as everyone else’s, is visibly performed in service to the public alongside all the other jurors, oftentimes just waiting.

While still the presiding judge (with his face on photos and dartboards throughout the courthouse and in the assembly room), Judge Steve Czuleger got busted by the judge greeting the assemblyroom jurors. In the course of welcoming jurors, the greeting judge commented that “even the presiding judge serves” and pointed him out. Getting outed had an interesting salutary effect. Throughout the day, jurors kept coming up to him and thanking HIM for serving! How do ya like them apples??? The rest of us were actually quite impressed that we finally got the guy to do some real work.

In another outing experience, after a federal judge waited with her panel for hours outside a courtroom, she snuck in the very back and positioned herself behind a column to be as inconspicuous as possible. Right after the trial judge gave his spiel about jury service, she was immediately introduced to the entire

panel as a federal judge with way way more important things to do and was dismissed. The unfortunate irony was that the trial judge had just given a very pretty speech about how important jury duty was, that even judges had to serve and that he himself had served as a juror. The dismissed federal judge felt it seriously undercut the impact of his introduction. She was embarrassed about having her time elevated over the other jurors many of whom also had compelling demands on their time and lives.

In terms of the VIP badge, it is hard to apply it to judges without being hypocritical when denying it to surgeons, caretakers or any number of other categories of people truly needed in their professions or chosen stations in life. Tell that to Cardinal Mahoney who served on a fender bender case some years ago. Harrison Ford had a few other things on his calendar but served in a multiple day construction defect case. Tell that to the Chief Justice or any of our myriad celebrities who have sat next to NVIPs. The VIP card for judges certainly undercuts our claim that jury service is a real opportunity to live the tenets of the Constitution and is an honor. And ultimately, do VIPs never go on vacation or sabbaticals? Are we that indispensable?

Judges who have served, even only in assemblyrooms, have had the opportunity of hearing how strongly jurors react to others using phony excuses to get off, and how much they appreciate strong judicial rejections of transparent efforts to avoid their obligations. Many judges reported to me the experience of sitting between jurors as they snickered over the increasingly creative and obvious efforts some jurors made trying to get off. Some of the strongest reactions were against attorneys on jury duty trying to explain why their time as lawyers was more valuable than the other jurors. These occurrences are hardly helpful to the trial lawyers who become saddled with the taint of elitism by their own colleagues.

The first instinct for anyone receiving the summons envelope seems to be understandably universal...how to get out of it. Those pesky envelopes are coming, though. In many counties, switching to One Day One Trial has required a tripling of outreach to make up for those jurors not being around for ten days. One happy result has been an extraordinary increase in the demographic diversity in the assemblyrooms. Of course, the possibility of judges serving did not even cross anyone's minds before One Day One Trial, as we excused anyone and everyone with a modicum of interest in getting off. Judges in most counties were given a de facto exemption as a matter of court policy.

Times have surely changed. In this new world, I believe I have had at least one lawyer and one doctor in every single panel I have called, and have ended up with a lawyer in half of impaneled juries in the last couple of years.

But again, what about them stinking judges?

Judges are legally not exempt from jury service and actually never were. Those who do serve rarely get selected. Most often, the sitting trial judge opts to excuse that familiar face looking back at them from the audience without even asking the attorneys.

In speaking to several judges who have served, the observations and comments are strikingly similar. In virtually every instance, at the beginning of deliberations, the other jurors immediately turned to the judge to be the foreperson. In most cases, the judge-juror declined the honor and instead, made a point of letting

the other jurors “lead” and providing input later in the debates, even ensuring that they were the last to speak. In one trial, the judge-juror expected to be unanimously appointed foreperson only to have the jurors look surprised and amused that he even expected that they wanted him to lead. They already had someone else in mind. In one instance where the judge was the foreperson, he ended up only persuading one other juror in a civil trial, which reached a verdict with a 10-2 split, the judge being in the unpersuasive minority.

There were many stories. In one trial, the judge-juror was in a high-security courtroom where the trial judge assured them that the matter they were serving on was simply a run of the mill case and that the security was unrelated to the trial. This tended not to reassure the jurors in this gang trial where they ultimately had to be escorted out the back due to gang supporters and families congregating in the hallways. She was particularly aware of her own discomfort as well as that of the other jurors as gang-spectators mad-dogged them through the trial.

Many learned of logistical obstacles that they had not been aware of. In one instance, a judge now always permits her jurors to bring beverages with them into the jury box. Until serving, she did not pay attention to the fact that coffee and other items were available only after a five minute walk and the regular breaks did not allow enough time to get the drinks, bring them back and drink them. There were many such practical roadblocks that saw the light of day with judicial service. In almost all instances, the judge-juror found that the other jurors were routinely afraid or reluctant to speak up about their issues or problems.

Most of the judges serving also indicated serious frustration with the downtime and waiting, usually with very little feedback or direction. Waiting for significant periods of time with no announcement of trial resumption created anxiety as the jurors did not know if they had time to get something to drink or slip away to the restroom or make an important call. This overview seems to confirm that delays are the order of the day in virtually every trial, lasting from many minutes to many hours. The frustration arose primarily from the absence of information and inability to plan, and was also viewed as disrespectful of the jurors.

One complication related directly to the judicial status of a juror occurred when a judge-juror was approached by another prospective juror who happened to be a litigant in his courtroom.

In another, it turned out that readback shifted a hung jury into one that was able to reach a verdict. In that particular case, the jurors needed to rehear the testimony of an alibi witness. When the trial was actually proceeding, there was so much emotion and tension in the courtroom that many missed the actual words spoken. Having the court reporter read back the testimony so it could be weighed and viewed outside the emotional context and intense finger-pointing, gave the entire group information that had otherwise been eluding them and causing disagreements. The judge-juror in that case now has a profound respect for the significance of readbacks.

In each instance, there seems to have been a bit of difference due to the length of the case. The longer the trial, the more the judge-juror became “one of the guys.” In shorter trials, they did not. It became apparent, however, that the impact of length on the dynamics of the jury applied to all jurors and not just our judge-jurors. The distance between the group in shorter trials applied to everyone, and the closeness in

longer trials, again, touched the entire group. With respect to a personal decision to truly be “just another juror,” one judge described his deliberate attempt to avoid any special treatment: he gave up his special parking and parked with the jurors; he did not return to chambers during breaks but stayed with the others; he rode the juror bus/shuttle with them and asked them not to address him as a judge. He felt he was able to fully blend in while also fully participating without undue differentiation. During deliberations, he did note that all votes were by secret ballot.

Ultimately, as many litigators learn the hard way, superjurors are a fact of life. They come in all sizes and shapes and they are hardly limited to judges. In fact, the best trial courses address the art of voir dire focusing on the need to be attuned to the potential leaders in the panel, whoever they are. Sometimes status may be enough. Conversations with lawyers who have served on trials demonstrate that the same experiences litigators express concern over apply as well to lawyers serving as jurors. It applies also to CEOs, professors in academia, scientists, and any number of other professionals. It applies to any strong, assertive or articulate personality. In fact, it appears that concerns about the influence of judges as a unique class may be more inflated than initially thought.

Certainly the more information a judge-juror has about the particulars of a case, the more it creates problems that would naturally give rise to a cause challenge or a peremptory challenge as it would to an orthopedic surgeon in a case involving orthopedics. One judge indicated his discomfort in a capital case, having previously been a prosecutor trying such cases. He was fully familiar with the process in the prosecutor’s office about how cases were selected for the ultimate penalty and he was also fully familiar with the path taken for decades after death verdicts are reached. He was, appropriately, challenged and was excused.

What repeatedly seemed to arise from the ashes of trials is the notion that jurors truly take their charge seriously, that jurors jealously guard their independence and the value of their individual vote. While strong personalities and superjurors have the potential to sway the group, they are not always or necessarily successful. Also, it appeared that quiet jurors with their few but well thought out comments often carried more of an impact than the more dominating jurors. And of course there were reports of the usual contrarians who take the opposite position no matter what the issues are.

The judges who served to verdict indicated that they felt they were able to contribute by providing the analytical ability we uniquely have that we often take for granted. Without overstepping their role by dictating the decision making on the substance of the evidence, several judges told me that they felt they were able to alleviate jurors’ natural fears of making procedural mistakes and embarrassing themselves. In many instances, they were able to more quickly direct jurors to specific relevant jury instructions, noting that it was helpful to have more than a single set of instructions. (In one judge’s trial, one particular juror commandeered the instructions and “interpreted” them to the other jurors while never allowing anyone else to see them.)

Another frequent comment was the realization of the importance of the trial judge staying neutral and not displaying reactions. For example, a judge noticed with amusement that the jurors were fixated on the stack of jury instructions on the trial judge’s desk. As the judge was reading the instructions, the laser focus of the jurors was on the size of the stack of remaining instructions.



One judge told me that he was concerned and sensitive about the power in his thumb should he have chosen to exercise it. After some reflection, he noted that he was probably overstating his influence. However, he did make a valid point about the fact that the trial judge and litigators in a trial need to be mindful in voir dire about talking to any potential superjuror to ensure that individual expertise or agenda should not override the evidence or the law. Many experienced judges deal with this directly, in part, when they remind lawyers on the panel to refuse to answer legal questions directed to them by the other jurors, and tell them not to conduct any seminars back in the jury room to ensure that decisions are made on the facts and the law provided to all of them.

Several judges told me that they had to really think about putting aside what they did already know. One judge in a misdemeanor case realized fairly quickly that his trial was a slow plea. (A “slow plea” is essentially a trial where everyone knows that the outcome is a given but they have to go through the motions for any number of reasons.) This judge had to keep the information to himself. In other instances, judge-jurors had to fight their instinctive response to rule on objections. In one trial, a judge-juror recalled that the trial judge had a style of rarely ruling on objections, but would reword the question to the witness to keep the trial moving. At one point, when the trial judge actually made a ruling, the judge-juror completely disagreed with it and unconsciously threw his head up only to find the trial judge staring right back at him. He quickly ducked his head and never looked up again. In another instance where the trial judge and judge-juror were friends, she found she could never make eye contact with the trial judge at any time in the trial because she knew her so well.

What about the trial lawyers and their challenges of judges in the box? While necessarily speculative, none of the judge-jurors I spoke to felt that the attorneys were afraid to excuse them. In one trial, the judge-juror thought the attorneys had forgotten that she was still there in the box when they accepted. In most others, it appeared that the intention to include the judges was a deliberate and conscious choice because of issues in the case or because of a sense that the judge might favor them. Surprise!

So...any other benefits?

The biggest is that each and every judge said they learned about life from the other side of the box. Each and every one has changed their approach and adopted new standards and techniques and all have a renewed and recharged respect for the institution.

Many learned new techniques as well as what not to do. One judge thought it would be helpful, learning as much as he did, for judges to spend an hour or two periodically in other courtrooms to pick up best practices and practical tips, particularly in voir dire.

They uniformly articulated a new understanding of and sympathy for jurors’ fears and confusion, and the incredible intrusiveness of jury service. Their experiences magnified their respect for the jury process. Every one of them commented on the seriousness with which jurors approach their responsibility. Their own service created a natural bond in their interactions with jurors. Changes included making sure that jurors are able to see exhibits while they are still in play by encouraging or requiring the attorneys to

either include them in jury books or publishing them, ensuring that individual or at least multiple copies of jury instructions are provided to the group, ensuring that time commitments are kept and that delays are avoided at all costs, being sensitive about explaining delays and keeping jurors updated on progress at all times, and making sure the lawyers speak English through the whole trial. Renewed sensitivity to jurors' time also extended to the daily schedule and anticipating the anxiety created when a trial might go into the noon hour or later than planned in the day without any notice to the jurors or any request for permission. Simpler verdict forms were a renewed commitment for many, as well as a commitment to explain the procedure of peremptory challenges to ameliorate a sense of personal rejection.

So maybe judges don't stink so much...

<b>Questions?</b>	Email Judge Connor: <a href="mailto:judgeconnor@adrservices.org">judgeconnor@adrservices.org</a>
<b>Mediate with Judge Connor</b>	Contact <b>Audra Graham</b> at <b>ADR Services, Inc.</b> (310) 201-0010 / <a href="mailto:audra@adrservices.org">audra@adrservices.org</a>