BACKWARD CAN BE BETTER WAY

Two Letters to Angus Ask Whether the Usual Routines in Court Are Best

JAMES W. McELHANEY

DEAR ANGUS:

I have an unusual problem and I need your help.

Although I've tried a number of criminal cases as both a prosecutor and a defense lawyer, until now I never thought about how oddly courtrooms are set up for the majority of trials.

As everybody knows, the judge's bench is typically located against the back wall of the courtroom. The jury box is along a side wall, either to the right or left of the bench. That setup gives the jurors a good view of almost everything in the room: the judge, the lawyers and especially the witness, who is in front of the bench on the same side as the jury box.

So far, that makes good sense, since it's the jury's job to evaluate witnesses—including their demeanor—as part of weighing the evidence.

Except when you've got a bench trial. Then you have only one juror—the judge—who has to evaluate the demeanor of witnesses by looking at the backs of their heads.

But when you realize there are far more bench trials than jury trials—even in criminal cases—you understand how silly it is to give the judge such a bad seat for watching the game.

Still, I never would have thought about it except for what happened last week. I was defending a local public official who was charged with taking a bribe, and the prosecutor's case was thin. I thought there was a good chance for acquittal.

The key witness against my defendant was a small-time moneylender who sounded fine, but whose face was the very portrait of mendacity. He kept rolling his eyes from side to side, smirking, sometimes giving a self-satisfied smile and looking out the window while answering questions. If only the judge had seen the witness's face, I think the defendant would have been acquitted.

So I'm sadder but no wiser as to what to do the next time. Any suggestions?

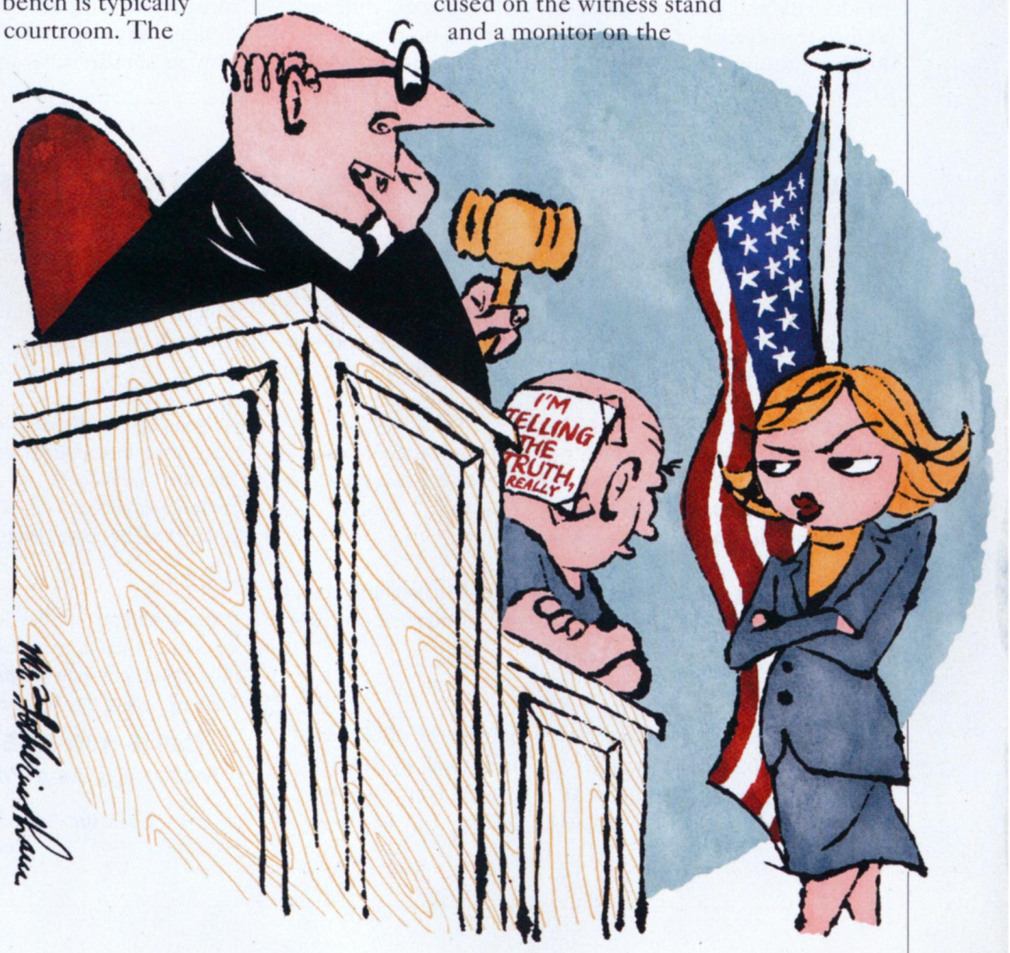
Beaten in Biloxi

Dear Beaten:

I agree. While some courtrooms are set up to give the judge a good view of the witness in any kind of case, most are arranged backward for cases that are tried just to the judge without a jury.

But we don't have to take the judge off the bench to fix the problem. It's not where we put the judge, but where the judge puts the witness that creates the difficulty.

And judges obviously have the authority to move things around anytime they want so they can see the witness full-face as he testifies. In fact, some modern courtrooms have been built with movable witness stands for that very purpose. Others even have a video camera focused on the witness stand and a monitor on the



bench so the judge can see the witness at all times.

But absent touches like these, most judges are content to have everyone in their usual places even if it means looking at the back of the witness's head.

Unless you ask. Which is my first suggestion. But while there is theoretically no harm in asking, some judges are pretty picky about how their courtroom furniture gets moved around. So don't rearrange the furniture on your own.

Second, remember that as counsel for your client, it's up to you to make the record of what happens in the trial. In the right circumstances, it would be perfectly appropriate for you to say, "Your honor, may the record show that the witness extended the middle finger of his right hand and held it in front of him while answering my last question."

After all, it's part of the witness's testimony.

Angus

Dear Angus:

Why don't U.S. district court judges understand how important it is for lawyers to participate in jury selection by talking to the panel of potential jurors and asking them about their qualifications to serve on the jury?

A federal trial judge has discretion to permit the lawyers to conduct jury voir dire. But in my experience, that discretion—in civil cases, at any rate—is always exercised by saying no.

When I go to trial in federal court, I know almost nothing about the people who are going to decide a case that typically involves serious issues and usually deals with large amounts of money.

But how can I decide who to strike and who to keep if I can't even talk to the members of the panel and hear them answer my questions? It doesn't seem fair.

Fed Up in Fond du Lac

Dear Fed Up:

You're right. While there are some notable exceptions, the overwhelming majority of federal district court judges ask all the jury selection questions themselves in civil cases. The closest they come to letting the lawyers participate is to allow them to submit questions they want put to the panel—which the judge may ask but is virtually free to ignore.

So why don't federal judges let the lawyers ask the jurors some of the questions?

For several very solid reasons: waste of time, boredom. And the accurate perception that most lawyers abuse the process by trying to sell their case instead of asking questions that will help select a jury.

Don't get me wrong. I favor letting lawyers conduct voir dire after the judge has asked the basic preliminary questions. Properly done, jury selection is one of the most important parts of the trial. After all, what could be more valuable than finding out who you are talking to, what their attitudes are about the issues in the case and how they respond to you?

Judge J. Thomas Marten in Wichita, Kan., is one of the notable exceptions on the federal bench who permit lawyer-conducted voir dire—after he has asked the panel his initial questions.

And Marten does something even more unusual: He runs the first part of the trial backward—starting with opening statements and finishing with jury selection.

Can he do that?

Why not? He's the judge.

Besides, if you look at it closely, you'll realize what a remarkable way it is to start any kind of case.

First, everybody on the panel hears the opening statements. No more 30-second, one-minute or five-minute snapshot descriptions of the case tucked into the voir dire and interrupted with objections from the other side. All the potential jurors learn what the case is about without the awkward dancing around about what you can say and can't say.

Second, gone are most attempts to abuse voir dire by using it to sell your case to the jury. It's easier to concentrate on letting the jury talk to you when you've already given your opening statement.

Third, all of the questions make much more sense—are easier to ask and easier to answer—because they're put in the context of each side's version of the whole story.

Fourth, whenever the court has you question the panel in small groups, immense amounts of time are saved because everybody has already heard the opening statements and you don't have to explain what the case is about again and again.

Fifth, no matter who does the questioning, you get far more revealing information from the jurors about themselves and their reactions to the case. They're reacting to the competing version of the facts they've just heard, not trying to respond to vague generalizations.

Sixth, whether selected to be on the jury or not, all of the panel members feel they have participated in the case—which does a lot for the public relations of our judicial system and the willingness of people to serve on juries.

But there has to be a serious downside to this system, doesn't there?

Judge Marten says one lawyer appearing before him objected to doing things backward.

"Why?" said Marten.

"Because I'm afraid that some people will make up their minds after they've heard the opening statements," said the lawyer.

"Wouldn't you want to find that out before you let them on the jury?" said Judge Marten.

Maybe Marten has it right. Maybe it's the rest of us who have it backward.

Angus ■

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