

## A VIEW FROM THE BENCH

*A series of informal interviews with the men and women who see the most courtroom action: our state and federal judges*

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Hon. Robert Alsdorf

A judge's rulings on motions and objections can provide an immediate reading of the judge's view of very specific issues. Occasionally, a judge will reveal opinions about the nature of trial or the conduct of counsel—some of which may not be what you want to hear. Seldom, however, do lawyers have the opportunity to listen to judges talk freely about the courtrooms they run and the trials they witness. This interview gives you that chance.

The Honorable Robert Alsdorf's fourteen-year tenure presiding over numerous cases in King County Superior Court provides us with a unique insight into the courtroom through his trial experience. Now practicing at Davis Wright Tremaine LLP, Judge Alsdorf talked with us about his observations and opinions of various aspects of the trial process.

An edited transcript of our interview follows:

**Tsongas:** I thought we'd start with the big question: In your view, what is the most common mistake you see in the way attorneys approach jury selection?

**Alsdorf:** I'd say two things. The first is the failure to prepare for the voir dire as you prepare to interview or depose any witness. Think through your questions -- not just the basic questions, but what do you do when a

*juror or witness says "yes" unexpectedly, or what do you do when a juror or witness says "no," or even goes sideways? You always prepare for depositions, so prepare for your jury voir dire in the same manner.*

*The second thing I would say is that attorneys often don't consider how to be conversational with the jury. Jurors are just like your neighbors and if you treat them that way, you'll have a much easier time. Whatever you are concerned about for your trial, think about how you would explain it to your neighbor, and just do it that way.*

**Tsongas:** In voir dire, do you think attorneys should worry about contaminating the jury pool? Do you think jury selection can have an impact on deliberations or the verdict?

**Alsdorf:** No...not normally. I think the question is: how do you deal with an expression of bias when it comes up, when a juror volunteers something he or she should not have? But I have not seen any lingering impact on juries from inadvertent comments. And I've talked to every jury I've had in my 14 years -- after every trial -- and there was never a sense that they had been tainted by the jury selection process. In fact, once they pass and get into the jury room, they are pretty proud of what they have achieved and they work hard based on the evidence that is given to them. They don't spend time thinking about some random event that happened in voir dire.

**Tsongas:** What is your view on the use of supplemental juror questionnaires?

**Alsdorf:** A lot of attorneys and judges like them. I don't. My concern is that when

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*(A View From the Bench continued)*

*jurors are starting the process, many of them already feel burdened and many of them wish they were somewhere else. If they get a lengthy juror questionnaire they feel burdened again.*

*My personal rule was to keep them as short as possible. In my court that rule has been violated possibly two or three times in 14 years; I generally never let them be longer than three pages.*

**Tsongas:** Are there particular cases where it may be more appropriate to use them?

**Alsdorf:** *Sure, cases which have a particularly strong emotional element. Anything that deals with sexual abuse, sexual misconduct, racial and ethnic prejudices – those things that are so hard for a community to deal with. In those cases, I think you do need to have a confidential questionnaire and often have to conference one-on-one with each juror who discloses anything that is sensitive or embarrassing.*

**Tsongas:** When thinking about the judge's participation in voir dire, particularly when you follow-up with people that have been challenged for cause, do you think when people are asked if they can be fair, they say "yes" just so they do not have to admit in open court that they cannot be fair?

**Alsdorf:** *I've had, probably on every jury, someone who said the opposite of what you are suggesting, that is, they said that they thought they couldn't be fair. There are certainly a number of times where people are on the fence and they say what you expect, "Yes, I can be fair." I don't think asking, "Can you be fair?" is a bad question. The real issue is not so much the answer of "yes" but instead how they say it. Is there a pause? Are they uncertain? Does it conflict with their other answers? I don't think it is a useless question at all as long as you are not taking their literal answer as the absolute truth. In fact, some of the people who admit it is hard to be fair are actually more fair than those who claim they will have no problem being fair.*

**Tsongas:** What do jurors expect from a trial?

**Alsdorf:** *They expect to be shown the truth and they resent it when they feel someone is obstructing that. I think that particularly when I think about objections made by attorneys. The best attorneys I know let 80% of the objections go by; they don't even make them. If you think back to the jury wanting to know the truth, the more you object, the more you fit the jury's mold of an attorney that is getting in the way of them learning the truth. Don't give up on your objections, but be sure to make only the objections that truly matter and are likely to be sustained.*

**Tsongas:** If lawyers could talk to jurors more frequently than they often get a chance to do, what do you think they would come away with an understanding of?

**Alsdorf:** *I'd say two things. Number one, your level of polish doesn't matter. Number two, honesty does. Jurors are bothered when they are concerned they are being misled. Integrity matters. They need to know that what you are saying can be relied on, and that what you said in opening ended up in the way you presented your case. All the flash in the world won't help if they think you are dishonest. And, frankly, they are suspicious of people who are too smooth.*

**Tsongas:** Is there anything else that you would add; things that they dislike about attorneys?

**Alsdorf:** *I would just emphasize that most young attorneys worry about their polish, their performance, or their style in court. I have never seen a jury swayed by that. Obviously jurors respond to your comfort level in the courtroom, but they care more about the attorney being prepared and honest, not whether you can imitate Jerry Spence or some of the other flamboyant people. You have got to be who you are.*

**Tsongas:** Do you have any advice for examination, either direct or cross?

**Alsdorf:** *Be prepared. Be polite. Don't be harsh. Jurors do not like attorneys attacking witnesses. And, if a witness does deserve to be attacked, the jury will pick up on it on their own. It is much better to allow*

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# SHADOW JURIES:

## *A Powerful Tool to be Handled With Care*

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A “Shadow Jury” can have several different meanings depending upon the attorney or the consulting firm using the term. Typically, shadow juries involve the use of four to six people who have been recruited from the trial venue and have been screened for juror eligibility. These “jurors” observe the trial and provide feedback to the trial team at the end of each day. The value of shadow juries lies in the fact that these “jurors” provide objective and immediate feedback that is difficult to otherwise obtain. If you’ve ever wondered, “*What is my jury thinking?*” shadow jurors can help. They allow you to make critical adjustments to your examination, arguments, and presentation of evidence throughout the course of trial. As Judge Alsdorf referenced in his interview, shadow jurors can clarify the issues that are confusing by anticipating the questions the actual jurors are asking. Similar to a mock trial finding where the jury was confused about an issue the attorney thought was well explained, shadow juries can highlight those issues not fully understood. Of course, the stakes in the real trial are vastly more important, which makes clearing up confusion before the jury deliberates imperative.

As with any litigation research, there are a number of critical issues that must be addressed before utilizing a shadow jury.

1. Shadow jurors should be randomly recruited and qualified for jury eligibility. Some attorneys ask friends, family, or associates to attend trial and give impressions as the case unfolds. But “confirmation bias” says that people who have already heard about the case (from your perspective) are more likely to give you a response they think you want to hear. An objective third

party can give you the feedback you need to refine your trial strategy.

2. Daily feedback should be obtained by a trained professional or consultant. Besides the fact that a member of the trial team will not have the time to be able to conduct nightly interviews, the objectivity of a consultant will produce more candid and meaningful responses.

3. The consultant conducting the interviews should attend trial with the shadow jurors so that he or she can be fully informed when interviewing the shadow jurors at the conclusion of the day. By attending trial, the interviewer can efficiently ask questions and make sense of responses before summarizing the findings for counsel. The presence of the consultant also helps ensure that the “jurors” attend the full day of trial, blend into the background, and do not interact with the real jurors, the attorneys, the witnesses, or others associated with the trial.

4. Shadow jurors should attend every day of trial, rather than periodically “checking in” on “important days” to provide feedback. Unless they have heard everything that the real jury has heard, their feedback has limited usefulness.

5. Finally, be aware of the overall limitations of shadow jury research. While an extremely useful tool, one should not use the shadow jurors’ responses as a predictor of the real jury’s verdict. Shadow jurors’ feedback should be used to pinpoint potential pitfalls and craft timely responses, but should not necessarily be used to “keep score” and determine the “winner” of each day of trial. ■

*(A View From the Bench continued)*

*a witness to self-destruct than to think you can, by yourself, take out a bad witness with hostile words. Let their own words take them down.*

**Tsongas:** What is your take on the use of “shadow jurors” giving feedback to the attorneys? Do you have any deep concerns?

**Alsdorf:** *I think the one case I had that went on for three months had shadow jurors present the whole time. It actually helped the attorneys understand what was missing from their presentations and what was confusing. So it can be helpful. (See article: Shadow Juries.)*

*I would say, though, that the practice of letting jurors ask questions may make shadow juries less necessary. I initially thought that letting jurors ask questions was a bad idea, that it would turn jurors into advocates. But if the jury is properly oriented, they will understand they are to be neutral and fair. My experience is that jurors virtually always ask very good questions. They pick up on things that lawyers have overlooked. By asking questions, the jury helps the lawyers fine-tune their case. Basically that is one of the primary functions that have been provided by shadow juries in the past. But now you are getting the reaction of the real jury that you are actually trying the case to. I've become a real fan of jurors asking questions [in court].*

**Tsongas:** What do you find most effective in opening and/or closing in terms of strategy?

**Alsdorf:** *Be concise and don't talk down to the jury. Also, tell a story. I've seen cases where attorneys make all the proper arguments, but they are all technical, legal arguments and they don't really cause people to follow along. Go back to the idea of acting like you are talking to your neighbor. If you had not a half an hour to bore your neighbors to tears, but you had three to five minutes to tell your neighbor what your case is about and why you should win, how would you do it? If you think about that and can answer it in three to five minutes, you'll do well, you'll do a great closing. ■*

## INDUSTRY UPDATE

### *Tsongas President in Leadership Position with American Society of Trial Consultants*

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The American Society of Trial Consultants (ASTC) held its 26<sup>th</sup> Annual Conference early this summer in Long Beach, California, which marked the beginning of Chris Dominic's term as President of the organization. Dominic will serve as President at an exciting time in the society's history. Likely agenda items this year include current proposals to add various parallel tracks of membership in the society, and continued development of the ASTC's practice standards and guidelines. Conducting seminars across the country with both large and small firms, Dominic frequently addresses the needs of attorneys as they prepare for ADR or trial. Repeatedly requested topics include: jury selection, the fundamentals and value of litigation related research, and the principles of effective advocacy. Over the past few years, and now as President of the ASTC, Dominic also hopes to put the spotlight back on the importance of the jury trial by speaking and writing about our jury system and the important role the public plays in its continued success. As part of this, Dominic will continue to work with judges around the country on improving voir dire conditions and other courtroom practices.

In existence since 1982, the ASTC's membership has grown to 535. Joyce Tsongas, founder of Tsongas Litigation Consulting, was President in 1984, and Dennis Brooks, a Senior Consultant as Tsongas, served as President in 1996. Anyone with questions about the ASTC is encouraged to contact Dominic at [chris.dominic@tsongas.com](mailto:chris.dominic@tsongas.com). ■