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# What Trial Judges Would Like to Say to Lawyers and What Lawyers Would Like to Say to Trial Judges

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# WHAT TRIAL JUDGES WOULD LIKE TO SAY TO LAWYERS AND WHAT LAWYERS WOULD LIKE TO SAY TO TRIAL JUDGES

PANEL TWO
HONORABLE ROBIN CAUTHRON*
HONORABLE DEE BENSON**
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JUDGE CAUTHRON: We are here to participate in an open exchange of questions and answers, and we encourage you to speak up. This is meant to be interactive; it's not just what we want to say to each other, but what you want to ask of us as well.

I'd like to start by saying that the problem with these kinds of panel discussions is that the only opinion I can give is my own. You can't always translate my practices in my courtroom to other judges. So I want to start by saying that I speak only for myself. I'd like to suggest to you that we judges are not as bad as you think we are, either individually or as a group. Very often you didn't get what you wanted because you didn't ask for it or didn't ask persuasively.

I'd also like to make an observation, which I think may be the most important thing any judge can say to any lawyer. The observation is that you come to us with your reputations and your credibility or lack of credibility. Everything you file, every motion you make, every request, every appearance, adds a little brick in the wall of your reputation before a federal court or any other court.

If you think we judges don't talk about you, you are wrong. So my first piece of advice to all of you lawyers would be to make sure that your reputations are good ones and that you have your credibility when you come to our court.

MR. HALL: I would like to say something similar to what Judge Cauthron said. In other words, you're handicapped by your own experiences. I'm supposed to comment on what lawyers feel needs to be done in terms of getting a just resolution of a case done more efficiently, done in a way that our clients and the public can say was fair. I've been on federal court committees where the effort was to look at our rules and to identify the problems in getting their cases through the federal court system. Every committee I've been on, from the lawyer's perspective, I hear the same things. What I hear is that sometimes the judges sit and sit for a very long time in a case where ruling on a particular motion would facilitate settlement, or would facilitate advancing the case, or at least inform the client of how a case is progressing. Why does it take so long for those motions to get ruled upon? That is the question I constantly hear.

Our district has a very heavy criminal load, so I think our lawyers understand that civil cases in the Federal District Court for the District of New Mexico do have a

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problem getting attention. Civil cases are simply second to the criminal cases. So that's one thing I hear. I do think it's very frustrating, for a lawyer and the client, when a number of motions pile up and they are sitting there; you feel like, if only they would get ruled on so something will happen.

CAUTHRON: I have an answer.

MR. CUNNINGHAM: What is your answer? Why do we file so many of these dang things?

HALL: That was a good question. Why do we see so many motions? I see a lot of motions that are filed, that are of a semi-dispositive nature, which I wonder why they were filed. Why? There seems to be a growing effort to get partial summary judgment on every thing and every point. I don't think that was the case when I started practicing. I think there was a notion that every defense and every element in a cause of action did not have to be examined or scrutinized piece-by-piece. But this is changing; I've seen it in my practice, I see it in other people's cases. Is it because the clients demand it, or is it because we feel there's an opportunity to get a strategic advantage that somehow makes the difference? I don't know the answer to that, Judge.

CUNNINGHAM: I spent the first eighteen years of my practice in New York, where I was both a state and federal prosecutor. The problem, of course, is volume. It's very hard to be writing decisions and trying cases, and I know that. But I think that the communication problem is a difficult one. Even in this district, I've had a number of cases where the case sits for a year and a half, and the client keeps worrying about it and having to pay bills, and many times you don't hear from the court for a year and a half, and that is difficult. But on the other hand, you don't have enough judges, don't have enough staff, and that too is a difficult problem.

CAUTHRON: I clerked for a federal judge directly out of law school. A law school classmate of mine, who was a member of a large firm at that time, told me that his firm made it a practice to file motions for summary judgment or partial summary judgment, with merit or without merit, for the purpose of educating the judge about the case. I've never forgotten that because I suspect a lot of that goes on, if you're honest about what you're filing.

You are not educating the judge. You are making the judge angry and wasting the judge's time. You are putting some case that deserves attention regarding a legitimately filed, dispositive motion in a pile so that your case can get attention to which it isn't entitled—at least not on that motion that you know wasn't any good when you filed it. That's what caused the provision, I believe, for sanctions to come into play, and I think that's what causes the backlog in cases. Also, there's a backlog because, unlike state court judges, federal judges have to issue written findings and conclusions.

I was on the state bench, and I long for those days where you hear argument and you say, "You win, you lose, and you prepare the order. Next case." There is some merit to that. You get decisions made. They may not be well thought out, and they certainly aren't well supported on the record. But you have these trade-offs in the federal practice that I think make it by and large better practice than most state courts.

CUNNINGHAM: But why not have us in before the motions are filed and say, "Let's talk about the case. Let's talk about where discovery is going. What motions

are you planning to file?" And why not be critical: "I don't think you should file that motion. That one sounds like maybe it has some merit." In other words, have a preview, an oral preview of what's going to happen.

AUDIENCE MEMBER: Well, that's exactly what the scheduling conference is for. And I think it's very hard for a judge who, frankly, knows very little about the case to tell a lawyer, "You know, that motion doesn't look very good. Don't bother to file it." That would be pre-judging that motion before you've had an opportunity to read the case law. Maybe as you get more experience as a judge, you can do it better.

CUNNINGHAM: Yes. In another jurisdiction I saw that work very well. Harold Rothwax,[1] who was a professor at Columbia, was also a state trial judge and he did that. If you went in front of Harold and he told you that, and you lost, next time he remembered that you filed that same motion in the next case and you would probably lose, and you might have been sanctioned the next time. He was fair, but it's really direct and it cuts down on the motions.

CAUTHRON: Well, I think there may be some merit in reviving the old motion docket day. The more I listen to this today, the more I think maybe that's how we handle those motions that don't deserve a lot of time. That is, have the lawyers come in and defend them orally, and you can then get rid of a motion that has no support. That's something I've never done. It's generally not done in our district, but it may be one solution to this.

AUDIENCE MEMBER: What about informing the lawyers that if they're bringing meritless motions, you are going to assess attorney's fees? Not that you have to follow up on that threat. Tell them you're going to. Frighten the lawyer.

CAUTHRON: You know, under Rule 11, it's no longer appropriate to sanction one side by imposing attorney's fees.[2] Off the top of my head, I don't know any authority for imposing attorney's fees for a bad motion in federal court. I guess if your credibility is not important to you, there is nothing I can do to make it important to you. But if you file a motion that I think is meritless, I'll remember it. That's not much of a threat if you're in a big jurisdiction where you won't appear in front of that judge again for the next ten years, but in smaller jurisdictions, we remember.

CUNNINGHAM: I think sanctions by peer pressure are much stronger than money sanctions. You're going to see that lawyer more than once, it's going to be embarrassing for the lawyer to do that same motion again and again, and I think that works much better than money sanctions.

JUDGE BENSON: My philosophy is that the lawyers really run the show. Lawyers are like the players on the team and the judge is, in many respects, like an umpire. And I would be all for giving more responsibility to lawyers. Lawyers ought to settle cases. I don't think courts were ever envisioned to be the babysitters for the lawyers. I think lawyers drive the process, but, do you know what my pet peeve is with lawyers? I mean not a pet peeve, but it's a recurring event and I don't have a

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1. Harold Rothwax, Justice, New York State Supreme Court, and lecturer at Columbia Law School. Deceased October 1997.

2. FED. R. CIV. P. 11.

lot of problems with lawyers. I do think that lawyers have an ego and they're very reluctant—this is a generality—to give up on something, even when it has been pointed out to them that they are dead wrong.

I had this big Microsoft lawyer in a case in Utah in my courtroom, and they had cited a case for a proposition for which it did not stand. My crack clerks had figured this out after reading their brief a couple of times. The attorneys said this case stood for something it did not stand for. In fact, they totally mis-cited it. It actually stood for the opposite of what they said it stood for, and it made a huge difference in the outcome of the summary judgment motion. So I have this lawyer from New York standing there, and I say, "By the way, this case from San Francisco, it doesn't stand for what you guys say it stands for. In fact it stands for the opposite."

I wish I had the transcript; maybe I ought to order it. It was just like *Alice in Wonderland.* After I pointed out to him that it didn't stand for what he thought it did, I would have expected maybe an apology. When it finally hit his brain, he did the second worst thing that he could have done, and that was to blame it on his staff. I don't know how they could do that and then blame it on an associate. But anyway, that was a perfect example. He would not bend, nor would he give. Never did. Then, later in the hearing, or maybe it was the next hearing, he got righteously indignant about the other side's misrepresenting something in the factual record and suggested the court should impose sanctions. I had been even-tempered and a nice guy throughout all of this, but I finally blew up at him. I really reamed him out. If they ever send one of these judicial popularity questionnaires on me to the bar of the state of New York, they're going to say, "This judge from Utah is crazy." You know he'll go to his grave thinking that.

So, I think that the lawyers who practice before me are by and large very good. But I am finding it interesting to see how hard it is for an advocate to recognize error, and its just a little pet peeve. It's not going to change the course of litigation, but it's rare when they say, "Thank you, I'm going to have to reconsider that."

Advocates become very convinced of their own righteousness. Probably one of the most interesting things to me about being a judge is to be in the middle and to see both sides, which I did not see in judges before I became a judge. I didn't recognize that. One real advantage of being a judge is that you actually don't have a horse in this race. But very few lawyers, in my view, recognize that in a judge. I don't know even if they can, because I didn't. So, when we take on the role of advocate, it's very hard to recognize the person in the middle actually may have some objectivity.

AUDIENCE MEMBER: How about the other side of that? What about judges admitting that they made a wrong decision?

CAUTHRON: If I make a decision—if any judge makes a decision—that's the decision. The appeals court can tell us we were wrong, and it often does. But if you're talking about reconsideration or trying to convince a judge after a decision has been rendered, I would say it's mostly a waste of time. You should have given your best argument the first time, not the second time around.

BENSON: I had a well-known lawyer in Salt Lake City come before me a couple of years ago in a tobacco litigation case. He brought a motion to reconsider after I refused to remand the case back to the state court—even though I desperately wanted to. But, being the objective guy that I've become, the law tilted that way,

and I ruled against his motion. On the motion for reconsideration, not only did he want reconsideration, but also he wanted oral argument. I had about eighteen lawyers in there, and he stood up and he looked at me and said, "Your Honor, I've been practicing law for over thirty-five years in this district, and I have never done this before. And your decision on our previous motion is the worst decision I've ever seen in my practice of law." And I thought, "He thinks I'm going to rule for him?" Hey, I'm still human.

AUDIENCE MEMBER: I think lawyers have problems with judges who are chronic antagonists. We have federal judges in Oklahoma whose attitudes toward lawyers are chronically suspicious and overly aggressive.

CAUTHRON: We can't solve that problem. There are judges who are lazy and don't do their work, and there are judges who are jerks. I'm sure there are other bad things I could think of to lay on judges. Judges are just people. They come to their jobs with the same flaws that everyone else does, and I think some of those flaws make some judges almost—if not completely—unfit to serve. But, I don't think we can help you with that. We can't change. There are, however, statutory methods to complain about judges. The Judicial Council of the Tenth Circuit receives complaints on judges and can act on them in certain ways. I know it's a little harder with federal judges than it is with state judges to get them out of office, but there are ways.

AUDIENCE MEMBER: Judge Cauthron asked why lawyers file motions to educate the judge and why they keep arguing after the ruling. The reason they do that is because it works. It inevitably works with some judges. I don't know how many times you've seen one lawyer who will keep going on and going on, and as he goes on the ruling gets changed and modified and eventually is a lot different than what the judge initially ruled. So it really is under the control of the judges. If they don't want motions for summary judgments, they should just immediately deny it. The reason they go on is because it works with some judges.

CAUTHRON: It's hard to immediately deny a motion that has three inches of evidentiary material attached to it that you have to read before you can immediately deny it.

JUDGE FROM THE AUDIENCE: I wanted to make one comment, but I also wanted to follow up on what was said earlier. There is recourse for lawyers, for judges who continue to use inappropriate behavior, and it shouldn't be tolerated. And many of us on the federal bench think it should not be tolerated. Some of us have even spoken to some of our colleagues about their behavior on the bench, because it brings disfavor to all of us.

I learned a lot from a colleague of mine. Once I appeared in front of him, and he ruled against me in court and gutted my case. I stewed about it all night, and I came back the next day, and to my astonishment, he said, "I had a bad day yesterday. I made a mistake and I'm correcting my mistake now. I will change the ruling." I think it's helpful for the judges to remember that we can make mistakes. And it's a sobering thought for me and for lawyers.

I had a lawyer from Chicago recently appear in front of me and he said, "Your Honor, I cited the case to you in my materials, but that case is no longer binding on you because it has been overturned by the circuit." The lawyer started the argument that way. I hear that sometimes for trial lawyers it's hard to give up an argument.

But it's important for trial lawyers to understand that if you maintain your disposition and you understand your role outside the court, you earn great respect from the bench. We talk about you at meetings and we talk about the good ones and we talk about the bad ones.

AUDIENCE MEMBER: I think there's a deliberate attempt by federal judges to let practitioners know that you are now in federal court. It's not unlike the lion and tiger trainer cracking the whip, getting the lawyers to stand on a stool and balance on one leg. I think some of that is very intentional. I'm not saying that it's not necessary in some situations, because frankly as co-counsel in cases with other defense lawyers, I have sometimes been appalled by what I see them do or argue in terms of the validity of the case. But I do think in some areas, some judges in our districts, at least, take pride in instilling an element of fear in lawyers who come before them, and in our district, the first time you appear in front of certain federal judges you get the "welcome to federal court treatment."

AUDIENCE MEMBER: I find that lawyers would rather get a dumb judge than a smart judge. Sometimes they get a lazy judge, rather than a judge that makes them work. But I'm not sure how much they want a smart judge—a judge that's read the motion, read the papers, and knows what it's all about before they come into court.

CAUTHRON: I think we're focusing on judges—almost half the audience is judges—and I'm sure we would have things to say to lawyers. The complaint I get continually from juries, and I speak to my juries after they return a verdict, every single time, without fail, the first thing they complain about is the repetition—the waste of time, the being talked down to. They ask, "Why do they treat us that way? Do they think that we're stupid?" I have told lawyers this both in status conferences and pretrial conferences and in CLE presentations. It makes absolutely no difference. Why is it that you all feel compelled? I know what we were taught in law school—you're supposed to tell them what you're going to tell them, then you tell them and then you tell them what you told them, but juries don't like that. So, you lawyers tell me why you find it necessary to repeat and go on and on and on.

HALL: That's a tough question. You ask that question, you gave it to us in writing, Dave, and I've seen that and I've been guilty of that. It interested me and I did go back—I do some teaching—and look in a trial advocacy book. And I just went to the index and found that repetition is in there five times. This is interesting to me. This is what we are teaching lawyers at college. That is, that the important points should be repeated, preferably throughout the direct examination, to increase the likelihood that the information will be retained and relied upon by the trier of fact. It is to some extent a culture of how we teach our trial lawyers who are coming along who won't get a lot of experience. Tell it first, tell it often, and tell it last.

CUNNINGHAM: One problem with the trial system is that it is not like teaching a class, where you can ask your student whether they get it or not. Now, there's no question that there's too much repetition. But if you're just doing the talking and looking at the people, you don't know what they got and what they haven't gotten.

AUDIENCE MEMBER: It's because we're not normal. We get educated to a point where our vocabularies are elaborate and our thought processes have been altered dramatically. We don't think like normal people, we don't talk like normal people, and suddenly when we're in front of these regular people, it's like we're trying to teach our dog to speak Polish. It's just something completely foreign to us.

I was criticized by a judge who said that my vocabulary was too elaborate. I've also been told that I skip too many steps and that I'm not being detailed enough with people—that my mind was jumping to the next thing. I think this is just an inherent problem that we have to struggle with as lawyers.

CUNNINGHAM: From a trial lawyer's point of view, there's always an issue about voir dire. Former New Jersey District Judge Herb Stearns has observed that voir dire is the most important part of a trial and that lawyers really need to spend time getting the right jury. And, if you get the wrong juror—somebody who has a preconception about a case—that oftentimes it doesn't matter what happens with the case, you're going to lose.

In federal court it's very difficult to get much voir dire. The complaint that's always given is that many lawyers try to sum up during voir dire. But assuming that the judge can take care of that, why can't you spend a good deal of time with jurors asking non-repetitive questions to try to find out what the jury is about and whether they can be fair?

CAUTHRON: The last thing any lawyer wants is a fair jury. That's not what you want. You want a jury that's going to find for your client, and every lawyer-conducted voir dire is designed to influence the jury. It's not designed to find fair and impartial jurors. If you've ever seen a trial proceeding in England, the only question that's asked is, "Are you related to the parties?"

The point is that you have an impartial jury, not one that's inclined to find in your favor but one that's impartial. Now, knowing that, I know it's very difficult for lawyers to establish a rapport with a jury and that you feel that disability going in. I have been on the state bench as well as the federal bench, and it was very common in state trials, criminal trials, for the jury selection process to take a week and for the trial to take one day. Now, if you think there is not a lot of unnecessary stuff going on in jury selection that takes that long, you'd be wrong. It is that experience, I think, that causes the federal court to be so restrictive in its voir dire practices.

About every two years, something is introduced in Congress to try to take away our ability to restrict you. So far it hasn't passed, but I think there are a lot of federal courts that are experimenting with lawyer participation in various ways in jury selection, and I think you deserve that, but I think if you understand why the restriction was placed on you, it may help you sympathize more. But probably not.

JUDGE FROM THE AUDIENCE: I take a different approach from Judge Cauthron. What I do is ask the general questions and I permit the lawyers to voir dire, and in the pretrial conference we talk about the fact that the lawyers are not going to make opening statements. The purpose is to inquire as to the prospective jurors' thoughts or prejudices that they might have about that type of case.

I talk to every juror after the trial is over, and I've had them say such statements as, "My religion wouldn't let me do this or that." That was never asked by anyone during voir dire. But, a very important element of the trial by jury is to be able to make inquiries and ask what prejudices, what thoughts, what experiences that juror brings to the courtroom. If lawyers are not allowed to conduct voir dire, in my opinion, you have been denied a fair trial, especially more so in criminal cases than any. When you have people sitting out there that are facing months and years in the penitentiary, to deny their counsel the opportunity to voir dire that jury is a denial of a right to a jury trial. The other comment was made, "Well, but there are lawyers

that don't know how to do it; they waste time. We've got a heavy caseload, we need to move this docket." None of those are justifiable reasons.

CAUTHRON: I actually don't disagree with anything you have said, nor do I agree. In fact, I do permit attorney voir dire in certain circumstances.

BENSON: I do believe lawyers want an unfair jury, and quite properly so. For example, I think a prosecutor eliminates all of the younger people who might have a liberal attitude toward life and would likely set the criminal free. Conversely, the defense wants to kick off anyone who is law abiding. So, I'm all for limiting voir dire. I do, however, let lawyers participate in voir dire. It's just that it's only to ask follow-up questions.

CUNNINGHAM: Have you had situations where jurors have done pretty weird things? I had a situation where one juror locked herself in the bathroom and just would not come out and deliberate. And this happened in front of a judge who didn't like much voir dire.

BENSON: I'm not suggesting eliminating voir dire, but allowing just enough to satisfy yourselves that you've got an impartial group in the box.

HONORABLE C. LEROY HANSEN:[3] When I started, I was somewhat restrictive when it came to voir dire, but I always let lawyers ask a few questions. As time has gone on, I have become more and more restrictive about voir dire.

CAUTHRON: I have had some really well respected trial lawyers tell me that they prefer judges to conduct voir dire, especially in difficult trials because they don't want to be the one asking the difficult questions. That's another viewpoint that perhaps should be aired.

CUNNINGHAM: I would rather ask the questions, because if I can't discuss these topics and get a feel for what's going on, I'm going to have to bring them up during the trial anyway. I don't want to duck it at the beginning. That's my own opinion.

CAUTHRON: Some lawyers have claimed that the way we do things in federal court, the trial tracks we put you on, are far too burdensome and speedy and result in more expense rather than less. Any comments?

HANSEN: Well, I think we have too many hoops to jump through. We have too many restrictions on how you practice law in the federal court. All of those things have been developed through the years, and we seem to keep going that direction. I don't have any input really into those new rules that restrict flexibility of those lawyers. I think if I were a lawyer I would keep my client out of federal court.

CAUTHRON: I think what we're doing is creating a real cottage industry in arbitration and mediation for lawyers.

CUNNINGHAM: You are. You absolutely are. If it's a complicated commercial case—and I have a couple of clients who have a lot of those—we try to stay out of federal court and try to mediate the case. Maybe that's what you want, for us to stay out of there. But if you get sued in federal court and your client is a commercial client, and you file a motion to dismiss or a motion for lack of jurisdiction that has some merit, you wait and you wait and you wait for the court's decision. Meanwhile, you still have to run around and get your discovery organized. I just had

3. District Judge, United States District Court, District of New Mexico.

a case that after twelve months was dismissed, but to keep my obligations up before it was dismissed there was $7500 a month of just doing paper and trying to get ready for the discovery. The client is furious.

HANSEN: It's too expensive to litigate in federal court.

CAUTHRON: I think the judges in federal court have as much criticism of the process as lawyers do, and we have little control, although I think together we need to find a solution. I think lawyers and judges recognize it and I don't think we can sit back and say it's not our fault; somebody else is doing this to us. We need to take control.

I don't know what the solution is. I'm critical of lawyers. I think lawyers create part of this problem because they depose everybody they can find in a case. In the old days you would depose only an expert witness or someone that you thought was going to change their story at trial so you could use the deposition for impeachment. Now, you go out and depose everybody. That increases the expense in a way that the judge doesn't require. I know that you think you have to have those depositions for dispositive motions, but Rule 56 refers to affidavits; it doesn't refer to depositions.[4]

Regarding expert witnesses, however, I think the way the courts handle them is completely unworkable. I mean, we give you a deadline for the expert's report, and then at trial if your expert tries to say anything that wasn't in that report, which was actually given before a lot of other discovery was done, he can't testify to that. The report was supposed to take the place of the deposition and reduce the cost, and instead what happens now is you have to do a forty-page report that has every opinion you could ever dream up, and then two months later have a deposition that may last three days. I'm exaggerating, but not all that much, in many cases.

HANSEN: On many occasions, I have interviewed jurors after a verdict and they don't mince words. It is a mistake for lawyers to ask the same questions twice. It is a mistake to ask everyone the same question. It is a mistake to define the same term more than once. The jury is very tired of it. With their collective recollection, they will remember those important facts, no matter how obscure lawyers think they are without repetition. So that's just a comment I have on the lawyers.

HALL: I do think that depends on what's being repeated. I do think that there are times when good trial lawyers come at the same point from different directions and that what we're trying to do is be persuasive. I see excellent lawyers who are maybe touching on the same idea, but it doesn't seem the same. In fact, it makes a different point to different people, so I'm sure we don't recognize this problem.

CAUTHRON: In case you all think that Judge Hansen and the jurors in the district in New Mexico are unique, let me say that jurors in Oklahoma tell me exactly the same thing after every trial when I debrief them after the verdict. They don't like the repetition. I have told lawyers this for the last ten years to no effect whatsoever that I can tell.

I had a case a couple of weeks ago that, on about the seventh day, the jurors told the clerk when she went down to get them after lunch, "Can't we make them stop?" I told the lawyers that when it was reported to me, because I think that's something

4. FED. R. CIV. P. 56.

they should know. Lawyers stand at the podium and they wax eloquent with their witnesses and they never look over to the jury to see whose eyes are open, whose eyes are glazed over, and who's got their back practically turned to them. There are so many things you can learn from that jury if you look at them, including that they've tuned out. They have heard it, they don't want to hear it again, and I think you all should believe us regardless of what you're taught.

HONORABLE WILLIAM W. DEATON:[5] As far as the repetitious questions, it seems to me that an admonition from the court is always good for your questions. If you say, "Now, you've asked that five times. I'm sure that all of us got it the first time. Refrain from that practice." I have found that to be pretty effective.

JUDGE FROM THE AUDIENCE: I have an interesting example. This panel was on approximately their second or third round of cases and plaintiff's first witness got up there and described a set of facts. Then the second witness got up there and started describing the same set of facts. Then a juror raised his hand and said, "Can I approach the bench? Judge, I've been sitting in this trial. They started asking questions to the first witness, now they're asking the same question to the second witness. I'm not sitting through any more of this. I'm going home." Well, what do you say?

So I called the lawyers up there and told them that the juror had said that he was not going to sit through all this repetitious stuff and was going home. The lawyers asked what I was going to do about it? And I said, "Well, nothing. The juror can go home."

CUNNINGHAM: When you're in a long trial and you don't get any response from that jury, I mean, you see their facial expressions, and you can try and read them, but it's not like we're talking back and forth at the session where we know whether we're getting through or not. I think good lawyers can figure out whether they're getting through. There is no excuse for extreme repetition, but sometimes you're wondering if the whole jury has figured out your theme or not.

CAUTHRON: Enough of the jurors have figured out your theme, and they'll tell the others when they deliberate. I should share with this group a technique that I have used in a couple of long trials that I found very effective. I encourage you to ask your judges, if you're lawyers, or suggest to your lawyers if you're judges, that you try this. I have used this only in two trials that were expected to take over four weeks, but there is no real reason why you couldn't do it in a short trial, too.

I give them a block of time at the outset and they can use it however they want, including for interim summations. So that when they ask a witness a question and get a response, instead of asking it five or six times, they can, with my permission, turn to the jury and say, "That was important. Please remember it." My purpose in doing it was to avoid repetition and save some time, but I think it aids in the jury's understanding of the relevance. Juries told me in both those cases it was helpful, and it doesn't take any more time, really. As lawyers, however, you have to manage your time so that you've got enough left for closing, because the block I give you is your closing argument, whenever you want to give it.

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5. Chief Magistrate, United States District Court, District of New Mexico.

AUDIENCE MEMBER: When you say interim summation, beyond just asking or saying, "That's important. I want you to remember that," can the lawyer at that point argue the significance and importance of it?

CAUTHRON: My intent has always been that the lawyer's comments would come between witnesses. I just said they could turn to the jury in the middle but I don't know if I'd permit that. It's never come up. It's always come at the end of a witness. The lawyer has said, "I'd like to use ten minutes of my closing." Opposing counsel always says, "Well, I believe I'll use ten minutes too." I've never had one without the other, but there is no reason it has to be that way. I found it very interesting.

AUDIENCE MEMBER: You're doing that without the benefit of the instructions to the jury?

CAUTHRON: That's right.

AUDIENCE MEMBER: Do you think that's a problem?

CAUTHRON: Well, another thing that I think we should do as lawyers and judges, I think we should instruct the jury on the basic elements of whatever it is we're talking about before they begin the trial. I don't do it because I never have time to settle on instructions before the trial begins. But we have uniform instructions at the state court level that govern diversity cases, and that's a starting point. We don't have Tenth Circuit pattern instructions. Some day maybe we will, but in criminal cases the elements of the offenses are pretty well settled, anyway.

I don't think there's any reason we can't give the jury some basic instructions. I think it's really ridiculous, especially in long cases, that we expect the jury to listen, absorb, and process four weeks worth of information without really knowing the purpose to which that information is going to be put. They don't know what they're going to be asked to decide. They just have to listen to everything without discrimination. I think that's a pretty hard thing we ask them to do.

I just finished a five-week antitrust case where the lawyers spent a fortune on the presentation of evidence. They had what amounted to a drive-in movie screen in my courtroom with the computer hooked up, and they had bar graphs and other displays. It was really interesting and the jury loved it. The jury told me afterward they thought that was very helpful.

But I thought this was a good case, a five-week case to try a lot of the things, and we did the interim summation. We tried to do instructions before we started, but I could never get the lawyers to agree on anything. We also did interim deliberations, and the jurors loved it. About once a week, I let them deliberate for thirty to forty-five minutes depending on our schedule, and I told them that they could only talk about the credibility and testimony of witnesses. They could not begin to make decisions about ultimate issues, claims, or defenses. They loved that, too.

HANSEN: Did the jury get the benefit of any instructions on credibility?

CAUTHRON: Yes. I gave them the credibility instruction in one of their opening instructions. I mean, my credibility instruction is about three pages long and it covers everything.

HANSEN: Anybody object to that?

CAUTHRON: No.

AUDIENCE MEMBER: Did you have any apprehension that maybe another witness will say something later that would bear on the credibility issue that they're now discussing? Or did you think they could correct that later?

CAUTHRON: I had some concerns with the practice, and I had never done it before. I wouldn't have done it if the lawyers hadn't agreed to it. I think if I were a lawyer, I wouldn't agree to it, but I think probably I'd be wrong because Judge Leonard,[6] who's done this for many trials and talked to many jurors about it, says that very often the jurors get off on the wrong track and they miss something or they see something that wasn't there, or one juror would go through the rest of the trial with one misapprehension that then affects deliberations. He says this interim deliberation fixes that. It allows the rest of the jury to get that one juror back on track. He's really high on it and the jury really liked it.

CUNNINGHAM: So do the lawyers have to agree at what point it will happen or can you the judge just say, "It's going to happen now," this interim deliberation?

CAUTHRON: It was based entirely on our trial schedule. If we finished early, that was the day they deliberated. If there was one day when I had a criminal matter and we weren't going to be able to start until 10:00, they came in at 9:00 and had an hour of deliberation before we started.

CUNNINGHAM: If the lawyer had said to you, "You know, we've got three witnesses on this issue and we've done two. We need to do the third before we do this," would you have waited?

CAUTHRON: I have.

AUDIENCE MEMBER: I'd like to go back just a moment to the summary judgment discussion. It may be that in some cases, summary judgment motions are filed so that you can get the judge to talk about the case.

CAUTHRON: That stinks. That's my opinion. What do you want to talk to the judge about?

AUDIENCE MEMBER: Well, because discovery is so expensive, it's good to get some issues out of the way, because that eliminates areas that you might otherwise end up struggling with. You get some feeling from the judge as to which direction you should go on those issues and it's very helpful.

CAUTHRON: Wouldn't that judge be prejudging the issue without benefit of law or facts?

AUDIENCE MEMBER: I think it goes back to what you said about a lawyer's reputation. You have to think about that every time you put on a motion. When you file a motion just to educate the judge, you're hurting your reputation. I think you have to ask yourself, "Is this a good motion?" And if it's not, you shouldn't file it. If there are too many motions being filed, it's because lawyers aren't picky enough and they won't tell their clients and their co-counsel when one should not be filed. There are other ways of handling it, too. I had a case recently where I was representing a defendant and there were several different causes of actions, and a couple of them were just wrong from a legal standpoint. I called the opposing counsel and I said, "You know, I want to talk to you." And he filed an amended complaint and took those out instead of making me file this motion.

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6. Timothy Leonard, District Judge, United States District Court, Western District of Oklahoma.

CAUTHRON: Well, I applaud you, and I think that's an important point. And I would suggest if you want to talk to the judge about a specific choice of law question or a specific cause of action that's going to significantly reduce your preparation, it's going to significantly reduce the judge's involvement in making rulings on down the line. If it's going to do anything that's going to make everyone's life easier, tell the judge what you want.

AUDIENCE MEMBER: Sometimes in scheduling conferences we will be alerted to a particular narrow issue that would be dispositive of the case that everybody would like to have dealt with early and we can have the matter sent to the magistrate judge to decide. That works pretty well as far as getting the issue addressed early and not having to spend a lot of resources.

CAUTHRON: Well, I'm glad you brought that up. Consenting to a magistrate judge is often a really good way to get something decided, or to get a conference held, or other things. That is all the time we have today. You've been very instructive to us. We thank you very much.