

# Washington Law Review

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Volume 28

Issue 4 *Annual Meeting of the Washington State Bar Association*

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11-1-1953

## Trial Lawyers: How They Appear to Courts and Litigants

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### Recommended Citation

Frank D. James, Address, *Trial Lawyers: How They Appear to Courts and Litigants*, 28 Wash. L. Rev. & St. B.J. 275 (1953).  
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such proceedings accounting questions arise, a certified public accountant should be retained."

There is another section on the practice before the Tax Court of the United States which pretty well adopts what the tax court itself has; claims for refund and criminal tax investigations are covered, and there is a general conclusion:

"This statement of principles should be regarded as tentative and subject to revision and amplification in the light of future experience. The principal purpose is to indicate the importance of voluntary cooperation between our professions, whose members should use their knowledge and skills to the best advantage of the public. It is recommended that joint committees representing the local societies of both professions be established."

#### TRIAL LAWYERS: HOW THEY APPEAR TO COURTS AND LITIGANTS

An address by Judge Frank D. James

This is a public relations program and I am going to try to focus and slant the few remarks that I have to make to you with that background in mind.

Most of you will recall, when I remind you of the fact, that the system of legal training as followed in most of the European countries and I think perhaps in most of the world is that early in his training period a law student decides or perhaps it is decided for him by his instructors upon their appraisal of his ability, whether or not he should follow the course of training which will fit him to become a lawyer or an advocate or whatever he may be called in that particular country, or whether or not he should become a judge.

I have talked to a number of judges since I have been on the bench who are judges in various European countries, and have been quite interested to learn that their course of training is so different than ours, and that they never have any trial experience; that they start out when they have graduated from the law school to serve an apprenticeship as a sort of clerk or an under-judge, or an assistant judge, and they work their way up in the hierarchy of their judicial system.

Now we have a better system, I think. At least it's a better system for our peculiar system of justice. I think it's better that our judges be selected from the ranks of our lawyers because it, at least, gives the judge an insight into the problems of practicing law and trying cases

from the lawyers' point of view. But unfortunately our system has the one obvious deficiency that the lawyer, except in the unusual case, cannot have the experience of being a judge and understand the problems of the trial of a lawsuit from a judge's point of view.

I think it is well for us in this consideration to recall something which perhaps we forget, that the canons of ethics—canons of judicial ethics—provide in the second paragraph that courts exist to promote justice and thus to serve the public interest. Their administration should be speedy and careful. Every judge should, at all times, be alert in his rulings and in the conduct of the business of the court, so far as he can, to make it useful for litigants and the community. He should avoid unconsciously falling into the attitude of mind that the litigants are made for the courts, instead of the courts for the litigants.

So, I want to discuss now, in the few minutes assigned to me, some of the things which I have had an opportunity to observe in the few years that I have been upon the bench, which have seemed to me to be fields in which lawyers could do a better job in their relationship to the public, to their clients, to the witnesses who see the conduct of the trial, to the lay people who sit as jurors, and to the people who just wander into the courtroom to see what is going on.

Now necessarily this portion of the remarks that I have to make is bound to sound a little picky because I am going to have to pick little incidents and talk about them. I don't want you to misunderstand me. The things that I am about to comment upon are things that I have noticed or perhaps that I have heard other judges say in our informal discussions of problems of our work.

As a lawyer, I am well aware of how much fun it is to sit around with other lawyers and discuss the merits and demerits of the various occupants of the bench and I assure you it is just as much fun for the judges to sit around and talk about the lawyers who appear before us. In a friendly way, of course. So, have in mind now, that what I am going to try to say to you are things which I think would be helpful to you from the public service point of view toward creating a better impression with the public of our profession.

The first thing that I will say to lawyers is, above all, be prepared. There is nothing that creates such a terrible impression upon a lay person, be he either litigant, witness, or juror as the realization that the lawyer who is presenting the case is obviously not prepared. And in

this respect, I don't want to proceed without emphasizing the importance of trial briefs. If you knew how helpful a trial brief can be to a judge especially when there are questions of law involved, you would never fail to take the time and prepare one, even though it might be very short. And I am sure that in many close cases where one of the lawyers has taken the time to prepare a trial brief and the other has not, that trial brief might very well tip the scale in a decision that is going to be hard and close to make.

While I am on the subject of being prepared I want to just very briefly, in passing, mention the subject of fees. The subject of the allowance of fees, I am sure you must appreciate, is one of the most difficult ones that is presented to a trial court. We judges who have been lawyers are keenly aware of the fact that the practice of law is not a profession in which people get rich, and we are keenly aware of the fact that much of the service which you render will never be paid for, but you must remember that we are standing there between you and the public, and when you ask for a fee which you know is reasonable and you know that the court will agree is reasonable, be prepared to justify it.

Our brother lawyers across the Canadian border have for many years had it all over us in the matter of recognizing the worth of their services and in keeping an orderly track of them and being able to present to the court at the appropriate time an adequate showing upon which the court can justify the allowance of a fee.

Then I must hurry on, and I would secondly suggest that in the trial of a lawsuit that you be genuinely respectful to the court. Now I don't mean that you must go there and bow and scrape. I realize that many of you are going to be trying cases before judges who are intellectually inferior to you, but the respect that you show is not the respect to that individual that is occupying that bench. The respect is to the institution which you serve and to the court of which you are an officer and a necessary part.

And one of the ways in which you can show respect and one of the ways in which you can enhance your chances of winning a trial, and one of the ways that is most commonly abused, in my experience, is in addressing your objections to opposing counsel. You would be surprised how many lawyers never look at the court, never say, "If the Court please, I object on this ground." They turn to counsel and say, "You

can't do that!" and many times when my patience has been tried I have said to lawyers, as quietly as I could, "Well, Mr. Soandso, if you address your objections to me, I think you will have a much better chance of having them sustained than if you address them to counsel." It doesn't seem to have too much effect. But that is one of the ways in which I think lawyers too commonly evidence disrespect for the court, and that is bickering between themselves.

Mr. Wright alluded to the fact that in speaking to the judges he stated that he wished the judges would not interfere with the trial of a lawsuit and believe me it is with great reluctance I think, that most judges do so. And as a matter of fact, that also is covered by our judicial code of ethics, number XV, which provides that a judge may properly intervene in the trial of a case to promote expedition and to prevent unnecessary waste of time, or to clear up some obscurity, but he should bear in mind that his undue interference, impatience or participation in the examination of a witness, or a severe attitude on his part toward witnesses, especially those who are excited or terrified by the unusual circumstances of the trial, may tend to prevent the proper presentation of the cause, or the ascertainment of truth in respect thereto.

But gentlemen, you must remember that in the last analysis the court is there not to referee a contest of skills between two trained lawyers, but rather to try and find the truth—a most difficult task I'm sure you will agree—and to do justice if possible, and so sometimes it is necessary for the court to interfere in the trial of a case. I understand that it's objectionable and as a trial lawyer it is one of the things that I resented most, but I think that is one ground upon which we can both learn to give and take a little bit.

The next, I'll hurry to a heading which I have entitled, "The appearance of impropriety," and I am going to speak briefly about something that bothers me a great deal.

Again I'd like to refer to the judicial canons of ethics and read you just this admonition which we are given and that is: "A judge's official conduct should be free of impropriety and the appearance of impropriety. He should avoid infractions of law and his personal behavior, not only on the bench and in the performance of judicial duties but also in his everyday life, should be beyond reproach."

Now there are some lawyers, and I'm happy to say there are very

few indeed, who do make it a practice, in a clever and well-concealed way, when they first arrive in the courtroom for the trial of a case to try to do something to impress their client that they are close to the judge in some way, or have some inside track with the judge.

This is what happens to me sometimes. A case will be sent down for trial. My bailiff will bring me the file and then will say to me, "I have to go up to the Clerk's office now because there are some exhibits to be brought down," or "There are some depositions which must be brought down so they can be published," and I'll say, "All right, come in and let me know when you come back." And then I'll start to examine the case and I'll hear a knock on the door. I'll say, "Come in," and who will be at the door? One of the lawyers, and he will immediately walk in my chambers and say, "Judge, I'm in a spot. I've got to get in touch with a witness. Can I use your 'phone?" and I'll say, "Yes, you can use my 'phone." Perhaps I should say, "No, I'm sorry but at this point in the proceeding I can't allow you to come in my chambers," and maybe I'm in error, but what I do is get up and walk out of my own office and into my inner chamber until he completes his conversation. But that, gentlemen, creates a very bad impression upon lay people.

Judge Shorett said to me on our way up here, "We have a lot of people in our population who either themselves or whose parents came from other parts of the world, and there are many parts of the earth, unfortunately, in which it is just accepted that anybody can be bribed if you have the price. And there are many parts of the world in which the public accepts that as to the way the judicial system functions, and I don't need to tell you because what Gene Wright has already told you in his talk this morning should be conclusive evidence that far too high a percentage of the population believes that that is true of the courts and lawyers. And the same sort of things—they may sound picayunish and small, but they are important, because as little drops of water wear away at the granite, they create in our community and in all the communities across the land, this unfortunate impression.

When you are trying a case before a particular judge and you happen to bump into him on the street with your clients, don't come over and walk down the street with him, even though he may be your best friend. In Seattle where we have a number of judges, we naturally drift down to the same restaurant to eat together and we are always delighted when members of the bar drop in and eat with us, and it's

always a chance to profitably exchange ideas, but I'm very pleased to note that the lawyers who sometimes lunch with us are never around when they are trying a case in our courthouse, and that's the way it should be.

And there is another thing of the same nature that I want to allude to, because I've heard other judges say that it's annoying to them, and that is this: in trying a lawsuit in a trial court do not address the judge by name. Do not say to the witness, "Now tell Judge James all about it, Mrs. Soandso," or when you are talking to the jury say "Now Judge James has instructed you that this is the law These are his instructions" and "Judge James knows the law " That's terribly bad taste. Refer to the judge as "The Court," or "Your Honor," or "The Judge."

Fortunately my time is elapsing, as I'm running out of ideas.

Now I want to relate to you something that happened to me when I was a very young lawyer. I was hanging around the courthouse. I had a job with a firm briefing and serving papers and whenever I had a chance I used to steal 5 or 10 minutes and sit down in the back row of a court room to listen to a trial. I can vividly picture in my mind today, and I probably will until the day that I die, my walking down one of the halls in the King County Courthouse and seeing a lawyer and his entourage of clients and witnesses come out of a courtroom door and walk down the hall. Obviously they had lost the case and as I went by I heard the lawyer say, "They got to the judge." Now I was a young lawyer, and that I say literally, made a scar on me that I have never forgotten.

If there is a corrupt judge among us, it is our duty to expose him, but it is just as much our duty to expose a lawyer who says that sort of thing about one of our judges, and if I knew then what I know now, I would have gone to the Bar Association and I would have told them what I heard and I would say, "I demand that he be brought before this association to justify that remark."

Gentlemen, I'm afraid that you have heard things of that nature said, and I am sure that you know that they were not true, and I suggest to you just as seriously as I can suggest anything that it is your duty, when you hear a statement of that nature made, not to take the easy way out but to bring it to a head and settle it, because it's that kind of talk that has resulted in the opinion that people of Texas have of lawyers.

I have been very proud to be a judge, and I am very privileged to speak to you today, but I can say to you truthfully that I think the proudest moment that I ever had in my life was after my admission to the Bar and the first time that I had a chance to answer when somebody said to me, "Well, what's your business, Mr. James?" I said, "I'm a lawyer," and I'm still proud to be able to say that.

THE FUNCTION OF THE COURTS IN MAINTAINING CONSTITUTIONAL GOVERNMENT, AND INDIVIDUAL RIGHTS AND FREEDOMS

An Address by the Honorable Orie L. Phillips, Chief Judge of the United States Court of Appeals, Tenth Circuit

For the privilege and honor of being permitted to address you on this occasion I express my deep appreciation.

I have had the privilege of meeting some wonderful people. I am very happy to come back to the State where two distinguished members of your Bar live, with whom I have had the privilege of working for many years, primarily in the American Bar Association, and with whom I have formed very intimate and lasting friendships, which I shall always cherish.

The men to whom I refer are Frank Holman and Al Schweppe.

I am glad that your president indicated that I was appointed back in 1923 to the Federal Bench in New Mexico, because one of your distinguished members asked me at the luncheon today, "Who appointed you? Roosevelt or Truman?" Well, since I am a member of a species—Republican federal judges—which until the recent event of 1952 in November promised us a change, was rapidly approaching extinction, I want to be numbered among those who were appointed before the New Deal. I don't belong to that crowd.

I don't want to become partisan, but I don't want to fly under any false colors either.

Now, my friends, we are living in serious times and in a sorely troubled world. I trust, therefore, that you will bear with me in my efforts to discuss with you a serious, but what I believe to be an important and timely subject, namely, the function of the courts in maintaining constitutional government and individual rights and freedoms.

Constitutional government and individual liberty are cornerstones of the American way of life. They are vital issues in the world-wide struggle between freedom-loving nations and the police states. This