



OBSERVATIONS AND STRAIGHT TALK: An Interview with David W. Elrod

by Susan Nassar

WITH MORE THAN 30 YEARS of trial experience and achievements under his belt, you would think David Elrod would be content to sit back and enjoy his success. Not so. He is always quick to remind new attorneys that they cannot rely on past successes. “You have to earn success and your clients’ respect every day.” That is not to say he does not enjoy telling a good war story now and again. One of his favorite stories involves a civil RICO case he tried to verdict, something only a few lawyers in Texas have done. Although modest by nature, he will tell you he is proud that “a guy like me from Oklahoma, the first in my family to go to college, has a nationally known trial firm that regularly tries cases against the nation’s largest firms.” After cutting his teeth in the trial section of a large national firm, he decided to start the Elrod law firm and has never looked back. He began by carving out a niche market, trying complex cases on behalf of national and international gas pipeline clients. His firm now handles everything from employment and software disputes to commercial construction litigation. He is keen on debating the advantages of one trial strategy over another, but it is results, as well as responsiveness, that keep clients coming back. In his typical no-nonsense style, David Elrod shared the following observations and straight talk:

What is one of the most common mistakes you see lawyers make?

Lawyers do not seem to appreciate the new duties and responsibilities they have with e-discovery. There is an increasing willingness by courts to impose extraordinary and costly sanctions for e-discovery violations, which can affect the outcome of the case. Rather than treating it as an afterthought, lawyers should be advising clients, particularly corporate clients, about their e-discovery obligations and helping them assess their retention policies on a regular basis before they are involved in litigation.

What advice can you give other small trial firms who want to compete successfully against larger firms?

Focus on identifying two or three critical issues that will win a case. I call them “death shots,” which are more successful than a scattergun approach. You don’t need an army of lawyers when you have a sniper that can produce the same result.

What is one of your “hot buttons”?

Lawyers who are willing to do anything, including manipulating the facts or the law, in an attempt to further their client’s interests. It’s a short-sighted approach that usually backfires and undercuts the lawyer’s credibility. I think there is a lot to be said for winning with integrity.

What is your opinion about arbitration as an alternative to a jury trial?

My firm handles a fair number of contract disputes involving

arbitration provisions. Arbitration has many advantages, but it also has drawbacks. A common misperception is that arbitration is cheaper. If an arbitrator does not limit discovery, it can be very expensive. Another drawback is that, except in very rare circumstances, an arbitration award cannot be overturned on appeal. If a jury or a judge gets it wrong, you can appeal. If an arbitrator gets it wrong, you’re stuck with the result. Arbitration can work if it is truly faster and less expensive, and this is the trade-off for the waiver of an appeal. In my experience, though, arbitrations are as long and as expensive as jury trials.

Do you think jury trials will eventually become extinct, and do you think the decline in the number of jury trials is a good or bad thing?

It’s very unlikely jury trials will ever disappear. They’re too firmly imbedded in our country’s history and culture. However, if the jury system is to remain intact, we should be concerned about future generations with only a handful of lawyers prepared to handle trials. Most young lawyers are groomed to think that discovery is the “main event – the endgame” in civil litigation. Litigation has become much more expensive and less attractive. Delay and expense is often used as a tactic in today’s litigation. Many things we can’t control. One important thing we can control, though, is training younger and less experienced lawyers. Trial practice will continue to evolve and change. The trials of today may look different than what many of us saw twenty or thirty years ago. We need to continue to train and mentor new attorneys to handle the next generation of jury trials. This often requires a commitment by firms to let new attorneys work on smaller cases or any case that gets them in court more often so they can hone their skills. Whether they end up using the skills they learn in jury trials, ADR or other parts of their practice, we cannot simply let the next generation of trial lawyers hear “war stories” without teaching them the skills they need.

What advice do you frequently give young trial lawyers in mentoring them?

One thing I always emphasize is the importance of telling a story. Good facts will only get you so far. Our job as trial lawyers is to weave the facts into a convincing story that makes a judge or jury want to decide in our favor. It is all about perception – how the trier of fact perceives the story we are telling them, the facts that make up that story, and the credibility of the witnesses. The other thing is you can never spend too much time preparing. The more prepared you are, the more at ease both you and your client will be in the courtroom under pressure.

What can trial lawyers do to make their clients less vulnerable in high stakes litigation?

Protecting clients against what I call “bet the company litigation” has to happen long before a lawsuit is ever filed.

Identifying weaknesses in a client's position early on is just as important as identifying strengths. Lawyers also need to be aware of and counsel against two common responses that will make their clients more vulnerable.

One tendency is for clients to internalize and cocoon. The key decision makers often hope the problem can be resolved "company to company." Hoping the dispute will be resolved or in an effort to avoid incurring legal fees, they fail to bring in aggressive and experienced trial counsel immediately simply because a lawsuit has not been filed. If they wait until after a lawsuit is filed, they have lost the opportunity to have their legal team on board from the beginning to help develop a strategy that will best protect their interests.

Another tendency is that many clients take a defensive posture and wait to see if a lawsuit will be filed against them. This "wait and see" approach often results in the client finding itself in an unfriendly forum. In many instances, if a client suspects a lawsuit may be filed against them, especially when the dispute is between parties in different states, taking the offensive and filing a lawsuit first can create significant leverage by positioning the dispute in the client's backyard and putting the other party on the defensive.

Intellectual property litigation seems to be hot right now. What should trial lawyers be watching for?

I think the proposed legislation aimed at limiting IP filings in the Eastern District has the greatest potential to impact IP cases in Texas. Venue is critical in IP litigation and Texas companies have benefited greatly from the fast and efficient IP docket in the Eastern District. It will be interesting to see how district courts decide motions to transfer venue in light of the recent opinions in *In re Volkswagen of America, Inc.*, 545 F.3d 304 (5th Cir. 2008), *cert. denied*, *Singleton v. Volkswagen of America, Inc.*, 129 S.Ct. 1336, 173 L.Ed.2d 587 (2009) and *In re TS Tech USA Corp.*, 551 F.3d 1315 (Fed. Cir. 2008). This will no doubt prompt more challenges to venue in the Eastern District like the one in *Odom v. Microsoft Corp.*, 596 F.Supp.2d 995 (E.D. Tex. 2009).

Finally, what advice can you give trial lawyers to help them survive an economic downturn like the one we are experiencing now?

We have a lean operation, so fortunately we haven't been affected by the economy in the same way other firms have been. My experience over the years has been that when the economy is strong, businesses sometimes choose to not pursue claims because they can put that energy into another deal. When the economy is slow, they have to more carefully weigh the cost of litigation against the money they lost because of a broken contract or deal. I always encourage the lawyers in my firm to keep up their marketing and client development efforts even when the economy and our business are strong. That way, the firm is better positioned to weather times like this when the economy is slow. Being responsive to existing clients' needs is also key.



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LITIGATION CALENDAR

by Tracy Nuckols

OCTOBER

Nuts and Bolts of Appellate Practice (video)

Dallas October 7 Cityplace Conference Center

Advanced Personal Injury Law Course (video)

Houston October 7-9 Norris CityCentre

Advanced Civil Appellate Practice Course (video)

Austin October 8-9 Cityplace Conference Center

Advanced Personal Injury Law Course (video)

South Padre Island October 21-23 Sheraton Fiesta Hotel

Civil Litigation Conference

Austin October 29-30 Four Seasons Hotel

Masters in Cross Examinationn

Shreveport, LA October 30 Sam's Town Hotel & Casino

NOVEMBER

Understanding Juries: A Mock Trial and More (video)

Houston November 3 Crowne Plaza - River Oaks Hotel

Advanced Civil Trial Course (video)

Houston November 4-6 Crowne Plaza - River Oaks Hotel

DECEMBER

TTLA Annual Conference & Expo '09

Austin December 2-4 Hyatt Regency Hotel

The Ultimate Trial Notebook: Family Law

San Antonio December 3-4 Westin Riverwalk Hotel

Current Legislative Issues Affecting Arbitration: The Arbitration Fairness Act of 2009

Webcast December 8 10:00-11:30 am CT on TexasBarCLE.com

The Trial of a Fiduciary Litigation Case

Fredericksburg December 17-18 Fredericksburg Inn & Suites