

# A VIEW FROM THE BENCH:

TIPS AND OBSERVATIONS FROM THE HONORABLE  
MICHAEL SIMON

## The Advantage

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In June of last year, the Senate confirmed Michael Simon's nomination to the federal bench in the Oregon District. Their vote capped an illustrious 30-year career that began in the Department of Justice's Antitrust Division and culminated in a distinguished private practice encompassing all manner of complex litigation. At both the trial and appellate level, Judge Simon's intellectual rigor, high energy, and good-natured approach to legal combat made him a well-known and well-liked member of the bar. We asked to interview him at his one year anniversary on the bench. Our goal was to collect advice for active litigators from the still fresh memories of his former career viewed through the rich, new perspective of the other side of the bench.

**Q: It's hard for me to believe that more than a year has gone by since we heard the exciting news of your nomination. What would you say is one of your most significant observations of the trial attorneys you have seen before you in your first year?**

**A:** While I have seen many fine attorneys in the last year, I have noticed that the communication coming from some is a bit more, "sender-based" than I expected.

**Q: So you mean "sender based" in the classic communication sense? That the message sounds like it is taking the sender, not the receiver, of the message more into account?**

**A:** That's right. In the jury trials I have presided over, I could tell the jury was not accepting some of the claims made by the attorneys, and it appeared that the attorneys felt fairly confident that their message was clear. They were not noticing when their message was not getting through—at least initially.

**Q: Can you think back to a time when this happened to you?**

**A:** Oh yes. In retrospect, I learned plenty from the cases I lost and not enough from the cases I won. I learned more from the cases I lost because I would do a post-mortem on them and really pick apart what happened and why. I should have also been doing that on all of the cases I won. There was one case in particular, about 20-years ago, where I had better facts - but the attorney I was up against had better themes and arguments. I realized after we lost that I had done what attorney Bill Barton now refers to as, "stack-a-fact." I had 95 of them or so, and by golly, I took that jury through every one of them. I wasn't thinking of my audience.

**Q: So what do you do about this? How does a developing trial attorney shortcut his or her way through this tough knocks learning process?**



**A:** After reading Daniel Kahneman's book, *Thinking Fast and Slow*, I now think I have an answer to that question. You do a "pre-mortem." That is, if I were to consciously think in the early phases of a case, "If I lose this case what will be the most likely reasons

that I lose it?" I was always good at determining the case's strengths, but I didn't ask the question enough, "If people end up disagreeing with me, where will that happen and why?" To be fair, this is easier said than done. In the strategy and jury research work you all do, that is easier for you, and now that I am on the bench it is much easier for me to see it with a different perspective. I suspect most attorneys will, at one point, have to go through the experience of delivering an argument that is not persuasive to a mediator, arbitrator, or jury, and because they aren't really getting the feedback that it isn't going anywhere, they will just stay on their original plan to no avail.

**Q: This is fascinating stuff. We could talk about this for hours, but let me move to a different topic – jury selection. We often hear attorneys tell us that it's hard to learn anything about jurors during voir dire in Federal Court because the judge gives 15 minutes or less to question the jury. Do you agree with this?**

**A:** One can learn a lot in 15 minutes if one asks the right questions. Unfortunately, I don't think that many lawyers are using their voir dire time effectively. My perception is that if lawyers used their time more effectively (but still within the bounds of proper voir dire), more judges would be more willing to allow more time for attorney questioning. (I would.) In addition, in several of the jury trials over which I have presided, one side or the other spent significantly less than five minutes asking questions during voir dire. Those are missed opportunities.

**Q: After observing voir dire from the bench, can you think of how you might change the way you approached jury selection as a lawyer?**

**A:** I believe that lawyers spend too much of their voir dire time asking about factual or historical matters in the prospective juror's background and not enough time asking open-ended "attitudinal" questions. Isn't one of the primary purposes of voir dire to learn about a prospective juror's attitudes, biases, preconceptions, and prejudices (conscious or subconscious)? Also, wouldn't it be good to learn how a prospective juror thinks, learns, and processes information? In addition to helping in jury selection (and "de-selection"), that information could be used in helping to tailor trial presentations to the ways in which the jurors actually make decisions.

**Q: Lawyers often tell us that they don't want to waste the jurors' time in opening statement, so they make it**

**short. And sometime the opposite is true – the lawyer creates information overload in opening (there’s that “stack-a-fact” again). What have you observed to be the ideal length of an opening?**

**A:** I have observed lawyers repeat themselves way too much in opening, closing, cross-examination (more so in cross than in direct), and during oral argument to the Court. I have also heard jurors ask after a trial was over, “Didn’t the lawyer think that we got the point the first time – or the second or the third?” Frankly, I am (was? no, am) guilty of that too. (My wife once told me that I never walked by a dead horse that I wouldn’t beat.) The ideal length of time for an opening statement is precisely that amount of time that meets the purposes of an opening statement (offer a memorable theme that sets the stage, provide enough guidance that will help the jury process the evidence, and inoculate for bad facts if necessary) without repeating anything. Shall I say that again?

**Q:** **That actually is worth repeating. We agree that there is no magical number of minutes that an opening should be. Again, thinking of your audience, an opening should be tailored to delivering the message as effectively and efficiently as possible. What about closings? What do you see as the most effective strategies in closings?**

**A:** It only took me 30 years of trying cases to learn that “stack-a-fact” is not a model for effective closing arguments. Need I say more?

**Q:** **We agree, closings are a time for telling the jury how to connect the evidence to the verdict form. We’ve seen some very effective graphics visually tying the evidence to the claims. That brings up the point of demonstratives. How do you like the electronic courtroom? Do you think it is effective in helping jurors understand the case?**

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**A:** The electronic courtroom has tremendous potential, but only if it is used effectively, which often is not the case. By “effectively,” I mean interactively, lively, and fun-to-follow. Each pair of jurors shares a relatively small display screen,

and reading a lot of small print on a letter-sized page is neither practical nor comfortable. If, however, key portions of the evidence are highlighted, expanded, placed next to other portions, or otherwise used in a creative, lively, and interesting fashion, then the jurors will better understand and follow the points being made. In addition, the courtroom technology allows both witnesses and lawyers to “mark” or “draw” on exhibits that are being displayed in order to bring the points “to life.” This is what I mean by “interactive” communication.

**Q:** **Michael, this has been so interesting. Do you have any final suggestions for lawyers in civil trials?**

**A:** Yes, I’d say two things. First, I want to amplify what I said earlier. I truly believe that many trial lawyers are so focused on one aspect of the strategy – figuring out how to win – that it creates blinders in other places. We [as lawyers] are not sufficiently taught or trained that in order to do a case assessment thoroughly and completely we also need to think about how our objective might get derailed. One aspect of a winning strategy is to figure out how one might lose, assess the causes of that, and make compensating adjustments if possible.

**Q:** **So let me make sure I have your pre-mortem figured out. What’s it like?**

**A:** In some cases it’s sitting down with yourself – in other cases sitting down with the trial team, which sometimes includes the client and/or consultants. The question that has to be asked is, If I/we lose this motion or this jury, why will it happen? “The judge/jury didn’t get it” is not a good enough excuse. Force yourself to ask, “If I was truly neutral, what would I think of this argument?” I really believe that most lawyers can do this if they really want to. Kahneman suggests that we do not think hard enough about anticipating adverse consequences because it’s unpleasant and takes more energy than thinking about what is pleasant.

**Q:** **You said you had two suggestions. What was the second?**

**A:** The second suggestion has to do with the examination of witnesses. So far, I have been less than impressed with how lawyers have used the technique of impeachment by prior inconsistent statement during cross examination. In several trials, the lawyers did not seem to know how to effectively impeach with prior deposition testimony. Although such impeachment is often most effective when the deposition has been videotaped and digitized, there are still effective (and classical) methods of using a written deposition transcript to impeach a witness. For some reason, these methods do not seem to have been used much in the trials that I have observed and the methods that were used were not all that effective.

**Q:** **Thank you so much for taking the time to share your insights with us. We looking forward to learning more from you as you continue your service on the Bench.**

**A:** My pleasure.