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The Role of the Trial Attorney

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THE ROLE OF THE TRIAL ATTORNEY*

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Preparation for a trial is certainly different these days than it was in the days when I started in the practice of the law. In those days we had the Code of Civil Procedure and our professors would tell us all about code pleading and everything that we should set up in our complaints. We were scared to death that if we didn't say the right thing we would be out of court before we ever got to the jury; quite often we were.

Now we have the Rules of Civil Procedure, which are streamlined and are certainly very different from the old code pleading rules. I am a great advocate of the new rules, although I will have to admit that there are some situations in which the new rules are a little too simple. Practically all that must be done in this day and age is for the plaintiff to draw up a complaint, "John Jones vs. Jim Smith—comes now the plaintiff who says the defendant did it." Whereupon some defense attorney files an answer and says in reply to the plaintiff, "The defendant says he didn't do it." And you're at issue.

Preparation for trial is a complex matter. Difficulties start long before you walk into the courtroom to select a jury. Preparation is essential. One must know what his case is about, and certainly should know what his opponent's case is about, before getting into the courtroom. Our new Rules of Procedure are very helpful in this matter and in many ways in preparing a case for trial. Just as the football coach scouts the opposing team, so the trial attorney will scout his opposition to find out just what kind of play he is going to call at the time of the trial.

This article contains no trade secrets but does contain facts that are already known, or should be known by trial lawyers.

I don't think you can over emphasize the importance of taking full advantage of the discovery rules under our Rules of Civil Procedure. Its one way to find out what the opposition knows or what they are going to claim. Many illuminating things may be discovered from the opposition through depositions. Our Supreme Court has ruled that discovery depositions are luxuries, so one can't charge them up as costs.

DEPOSITIONS

Depositions may be luxuries, but that's a luxury tax that a client should be most happy to pay if he wants the case adequately and properly tried. There are many attorneys—maybe I shouldn't say "many," but there are some attorneys who think, "Well, let's don't go to the expense of a deposition. Let's don't call in this plaintiff,"—or defendant, whichever side you are on—"to question him on what he claims are the facts regarding this accident or the facts

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on whatever the controversy might be. Let's serve a bunch of interrogatories." So they figure out maybe twenty-five, thirty, forty or fifty interrogatories and serve these upon the opposing attorney. I think that's a big mistake, because, when one does that, here is what happens. The attorney says, "John, come on in, we've got some questions here that we've got to answer." They sit down and they really go over those questions—and they figure out just what the answer should be. Now understand, they are honest about it, but there is more than one way to answer a question and still be honest. When those answers come back—it will be surprising indeed if they are of any use to the attorney who served them.

An attorney for one of our public utility companies in Denver, some time ago, had a practice of attaching to his answer one interrogatory to the plaintiff, in which he said, "Please state all of the facts and circumstances surrounding the accident." The plaintiff's attorney invariably had a heyday with that kind of question and in short, nothing of importance was learned. After doing that for awhile he told me that he thought he had made a mistake and had stopped the practice and was taking depositions.

Another valuable thing as to the deposition: it affords a chance to see that witness, under oath, under cross-examination, as it were, and to see how that witness acts. It gives one some idea how that witness is going to act on the witness stand. I have found that more than one case has been settled on the attorney's recommendation after the attorney has taken the plaintiff's deposition. I have told a client, "That witness is going to crucify us when he (or she) gets up before the jury. That witness is so convincing that the jury is going to believe his (or her) story no matter what we say on our side. We're stuck; we had better settle." That's just one of the many considerations to keep in mind. Remember that under the new rules people other than the parties may be questioned and that discovery depositions are not limited to plaintiffs or defendants.

WITNESSES

If possible, when talking to witnesses, go over the evidence with them. Don't put the witness on the stand without having gone over their testimony with them. That may sound superficial, but it is surprising how many attorneys do just that. They will depend upon some junior in the office, who isn't trying the case, to go out and round up the witnesses, and when put on the stand witness and attorney confront each other for the first time. The results are often disastrous.

Occasionally a witness wants to make a career of it. They love to be on the stand. It presents a dangerous situation and an attorney must sometimes decide to exclude such a witness entirely rather than chance unfavorable testimony. Sometimes, it's better to have some evidence left out entirely than have a witness crucify the party which called him.

Never try a damage case—an automobile collision case—without first visiting the scene of the accident with your client if it is physically possible to do so. Much can be clarified by such a visit which would otherwise be impossible to visualize. I had a case one time where our client, in attempting to pass another car, collided with a car coming from the other direction. I could figure no possible defense. Since the case occurred at night, we went out to the scene of the accident and watched—and lo and behold, just a half mile from the point of collision there was a dip in the road—not much of a dip—but enough that the lights of cars coming from the other direction disappeared for about two and a half to three seconds. We sat there and timed it. I at least had something to argue to the jury, because when my client pulled out, the other car was in that dip. The jury didn't believe me, but it was a good argument. It might have worked, and at least it gave the opposition some worry.

Photographs are very important in these matters. When the jury can see something with their own eyes it helps tremendously. That's part of demonstrative evidence and is of some importance.

Medical Testimony

Medical testimony is another subject to think about. Like attorneys, practically all doctors are honest and sincere in their beliefs, but medical science isn't an exact science. Two doctors may not agree. It's very important when preparing to examine, either to put on the evidence or to cross-examine a medical witness, that you know something about medicine. Take time to talk to your own medical witness about the problem. If the other medical witness can't be present for trial—if they are going to take his deposition—it is well to spend a little money and have your doctor there when his deposition is taken, so that he can advise you as to questions to ask on cross-examination.

Pre-Trial Conference

There has been and still is considerable controversy between the older practitioners and the younger ones on the value of pre-trial conferences. In fact, our Supreme Court is pretty well divided on the value of pre-trial conferences, as demonstrated by some of the decisions that have been handed down. I, personally, am a great believer in pre-trial conferences. Law isn't a game; we are involved with human rights, and we are playing for keeps. We have a client's interests to represent, and it isn't a question of, "Well, I am going to catch this boy, and boy, am I going to surprise him." It is a question of knowing what the facts are—knowing what your case is—knowing what the opposition's case is and whether or not one should settle or go to trial. Then on the basis of these facts honestly advise your client. One cannot honestly advise a client unless there has been adequate preparation before trial including a pre-trial conference where these matters come into the open.

When it is ascertained who the witnesses are on the other side, if an attorney doesn't know by that time what they are going to testify to, an opportunity in which he can find out will be afforded to him between the pre-trial conference and the trial date.

THE TRIAL

Now, concerning the trial itself. There is no question that the plaintiff has an advantage over the defendant if he will utilize it. He has the opening on the *voir dire* examination. He has the opening statement. He has the opening so far as the evidence is concerned. He has the opening argument, and he has the closing argument. And there is the poor defendant all along trying to say, "I didn't do it," as it were.

As stated, plaintiff has a big advantage if he will use it. He has the opportunity on *voir dire* of getting across to the jury exactly what the case is about, or what this plaintiff claims it is about. These first impressions are important. Of course, defense attorneys try to minimize that. When defense attorneys get up they start telling the jury, "Remember, there are two sides to every question, and brother, we've got a side here." Point this out to them:

> "Remember now, the plaintiff can call any witness. He can subpoena all of our witnesses too, if he wants to, and call them ahead of us. Doing that would make you think that everybody is for the plaintiff. But remember, ladies and gentlemen of the jury, just because the plaintiff calls a witness doesn't mean that witness is for the plaintiff. That witness is here to tell the truth no matter which side called him and I am sure that if they hadn't called all these witnesses, we would have."

As a matter of fact it may often be advisable to subpoena practically all of the plaintiff's witnesses. It certainly doesn't hurt. One can then ask the witness, "Now, Mr. Smith, you received a subpoena from the defendant to be here too, did you?" "Yes." And then, when you are through with the evidence you can say to the court, "Well, we don't care to hold this witness for our defense. This has all been brought out here on cross-examination." That sometimes helps.

Another problem is that we are too apt to lose sight of the fact that jurors are not lawyers. Many times a juror who sits on a case has never been in a courtroom before. When the attorney gets up before those jurors and argues legal points in complex terms, the jurors think that he doesn't know what he is talking about. Then when said jurors go into the jury room and look at all those instructions they are sure he doesn't know what he is talking about. The attorney must get down to the jurors level and try to "communicate" with them, in common sense words which they will understand. If one is trying a case in a mining district, don't wear

a tuxedo, wear a blue shirt. They will think you are one of them, just trying to get the truth across to them.

Bear in mind another matter. Don't object too much because juries don't like it. Juries get the idea that the attorney is trying to hide something from them. Objecting gives the appearance that the opposition has something here it doesn't want out. It seems wiser not to object unless there are two things present: first, that your objection is good; and second, that it's important to keep out what the party is going to say. Follow those two rules on objections and you will avoid giving a bad impression to the jury.

Don't always "save an exception" when the court overrules you. This is no longer necessary under the Rules since they are automatically saved for you. Such a practice serves only to take the attention of the jury away from the issues of the case.

Determine beforehand in what order you want the witnesses to appear. In this respect I recommend that the attorney for the plaintiff not call the defendant for cross-examination as the first witness. My reasoning is this: the plaintiff has enjoyed the advantage on the *voir dire* and on the opening statement to the jury in which he has presented his case in its most favorable light. And then whom does his attorney call? He calls the defendant for cross-examination and affords him the opportunity to get his theory of the case to the jury before any witnesses have substantiated the plaintiff's story! It is a very bad mistake, but attorneys still do it time and again. Actually, when I go into court I just pray that my opposition will call my client in this manner.

Demonstrative Evidence

In recent years there has been an increase in the use of demonstrative evidence. Plaintiff attorneys are using it more and more, and defense attorneys some. There is no objection to demonstrative evidence but let's be fair about it! Let's say a person has a simple fracture of the arm. The idea of having a plaster case or plaster model of the bones of the arm made, having it marked as an exhibit, and then having the doctor take his pencil and make a mark where the break was—and then to hand this to the jury and have the jury look at this skeleton, serves no purpose toward promoting justice. Such a practice does nothing but inflame a jury so that the plaintiff can get the largest possible damages irrespective of how good a result the doctor got on that broken arm! Now I'm speaking like a defense attorney.

Recently I had a case where the plaintiff suffered very serious injuries of the type that Arthur Godfrey had in which a new socket and ball are made to replace a joint which has been irreparably broken. It developed that there hadn't been too many of that kind of operation, so the doctor who performed it had colored moving pictures taken of the operation to use at the University of Colorado School of Medicine. When the plaintiff's attorney found out about it, he came into court with the colored movie film of this

operation and wanted to show it to the jury. I objected and asked that we have a private showing first to see what the film was going to show. We had a private showing and I nearly fainted, seeing all that blood and mecurochrome and whatever else it was. I know that the judge was just about ready to faint too. When we got through he said, "It will serve no useful purpose to have the jury see that." As a result it was kept out. That was an attempt to carry demonstrative evidence too far. Let's be fair. Get your photograph. Get your plats. They are the things the jury should see. If necessary, try to get the court to let the jury go out to the scene of the accident if that will help. That type of evidence is excellent.

Another practice to discuss is the use of blackboards. That practice can work to produce both justice and injustice. California is one of the states where the use of blackboards for a graphic impression on juries was developed. In a recent California case it was held to be improper to use a blackboard prior to the closing argument. The use of blackboards in an opening statement is tantamount to putting up a chart that is not yet in evidence, or of putting up a picture of the scene of the accident which isn't in evidence. What one does is to put before the jury, visually, evidence not yet properly introduced into evidence.[1]

One more point in connection with blackboard calculations: so many defense attorneys and plaintiff attorneys too, forget that there is a difference between "life expectancy"and "work-life expectancy." A man may have a life expectancy up to 90, but that doesn't mean he can work up to 90. There are charts on that, put out by the Society of Actuaries, that are very helpful when one happens to be on the defense. Of course if one is on the plaintiff's side you would never think of such a thing as a "work-life expectancy."

Trail work is a lot of fun and a lot of work. There are many headaches involved, and much worry. One can get a lot of grey hairs and have many sleepless nights. When an attorney is dealing with the court, he should remember that he is dealing not only with the judge but the jury. Be honest, concise, clear, polite, and to the point. If the court asks about a certain point of law, and you know what it is, even if it's against you, tell it. Don't start hemming and hawing. The court is smart enough to tell when you are bluffing. If an attorney tells the truth, the court will have more respect for that attorney next time when the law is for him. It's not only one's duty to do that, but it will pay dividends in the long run.

Again, I say that throughout the trial of a law suit your demeanor is important, and honesty is imperative! Whether you win or lose, when you leave a courtroom at night and go home, if you have done your job in a manner befitting an officer of the court, you can't help but have a feeling of satisfaction.

[1] Bates v. Newman, 264 P. 2d 197 (1953).