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TRIAL TECHNIQUES–PART II

EDITOR'S NOTE: The following two articles complete a series on the subject of Civil Trial Techniques in Colorado District Courts commenced in the October, 1951 issue of *Dicta*. The authors previously presented this material in addresses given at Institutes held in Denver, Grand Junction and Pueblo.

PLAINTIFF'S PROCEDURE IN ESTABLISHING A PRIMA FACIE CASE

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This article should be prefaced by a short, but pregnant explanation.

While I have prosecuted a number of plaintiff's cases, the ratio to those defended is about one to fifty. Although my trial training was received under one of the ablest trial strategists in the state, it was almost entirely confined to the defense of cases and, therefore, the following will consist largely of observations of things which, from the defense table looked good or bad, or ideas, which to my sorrow and embarrassment were either stillborn, or bore no resemblance in life to the more or less idealist hopes in which they were conceived.

Suggestions here may seem somewhat academic to many older and much more experienced practitioners, but if so let me remind them that this is simply a written version of a talk aimed at members of the Junior Bar. Many of these boys will, by careful, earnest and sincere preparation of a case, figuratively kick the teeth down the throat of older and more experienced counsel who come into court relying upon their gray hair and a poorly remembered brief that they have used in a previous case (and one related with everlasting but boring glory) twenty long Supreme Court decisions ago!

Assuming that you have decided upon a trial by jury of a damage case in order that you may squeeze every sympathetically blinded dollar out of it for the benefit of your client, your jury examination should have made them individually know you and your client's honest and sincere purpose of seeing justice done! Remember that the average jury is just as unpredictable as a baby's bladder, and that no single verdict is going to make or break your career.

There are a few answers to some questions which you should have decided upon before you actually start putting on your case.

Should you let the jury view the premises? This may or may not be a good thing for your case and your decision must be controlled by the circumstances surrounding it after a careful study thereof. It is suggested that you carefully examine the situs of

the premises and in doing so also examine the various approaches thereto, as these approaches may make a tremendous impression upon the jury. For example, suppose you are defending a condemnation suit and the route chosen for the jury to travel to the premises runs through a slum area when it could have passed through a respectable or even plush district. The disadvantages and advantages are obvious. Your order for such examination should not only specify the situs, but the route to be travelled in reaching it. It should be unnecessary to mention it, but the jury must be taken out by an officer of the court authorized to so do, without the presence of any other person, and the court should order that person not to point out specific things to the jury. Transportation, of course, must be arranged by the requesting party. The motion for such viewing may be made at any time, either at pre-trial conference, or at any propitious time during the trial, but you yourself should know the decision as to whether or not it is advisable before the jury is in the box.

SHOULD YOU MOVE TO EXCLUDE WITNESSES?

Surprisingly enough the possibilities of this motion seem to be unknown to, or overlooked by many plaintiff's counsel. This motion obviously must be made prior to the calling of the first witness and it may be made by either side. The granting thereof is discretionary with the court, but as a practical matter it seldom is denied. It should be remembered that the motion if granted does not exclude parties. Here again the advantages and disadvantages must be carefully weighed.

It seems to be advantageous when the opposing side has a large number of witnesses and you have only a few, because witnesses, after having listened to the story told over and over again, have a tendency to harmonize their testimony and also to take sides and color their testimony in support of the side which they are serving. They also become fore-warned of sharp cross-examination and the pitfalls exposed thereby. Sometimes your own witnesses will pick up small differences of testimony of previous witnesses and blurt out something injurious to your case that is in violent disagreement with the story told you during your interviews with them. Last, but by no means least if your opponent has an unwilling witness under subpoena who has been somewhat mollified with the prospect of seeing a dramatic show, but, as a result of your motion, has to sit for two or three days on a cold hard bench in the hall thinking about the valuable business he is missing, his cooperative spirit for your opponent is apt to be a big fat minus by the time he does get on the stand. Don't forget here that you, also, might have such a witness on whom you are depending. It may be disadvantageous to make such a motion when some of your witnesses, because of their extremely accurate knowledge, may be able to pick up inaccuracies in testimony of opposing witnesses and thus be helpful to you in cross examination.

Further, sometimes a sharp cross examination of a preceding witness has a tendency to "cool off" and make more temperate the testimony of other opposing witnesses who follow. Also, expert witnesses have a tendency to be more careful in their own testimony on their specialty if they recognize another specialist in the same field listening to their statements.

WHEN TO CALL WITNESSES

The order in which witnesses should be called is something that requires a good deal of study in each individual case and can very well spell the difference between success and failure. Present your case in a natural and chronological sequence. Try to present as your first witness the one who makes the best appearance of honesty and sincerity, one who has the best memory of events, and one who is alert and has confidence in himself. The reason for this is quickly apparent. The first witness almost always is subjected to the most exhaustive cross examination. He is taken back and forth through every phase of the transaction, he is asked to fix directions, estimate speed, identify structures, describe weather conditions and many other details. No other witness usually gets such a thorough working over, save possibly the plaintiff, if the first witness is not he. Remember too, that such a witness is not always the best educated. There are other reasons why this first witness should be your best one. Remember that your jury is now getting its first impression, and it is, at this stage, curious and alert and it will listen closely to the statements made and derive a good, overall opinion of the case with this first testimony. Another thing which should not be overlooked, is that, if your first witness is adequately acquainted with all of the facts, the defense attorney is forced to tip off or reval his line of defense by his cross examination, thus warning you and giving you a chance to anticipate and forestall the re-emphasis of extensive cross examination on all subsequent witnesses by limiting your direct examination on successive witnesses to matters not so painful to your case.

Calling the opposing party for cross examination under the rules can result in a fiasco, unless done properly. It is almost unbelievable the number of lawyers who, when the jury is settled in their seats, will grandiloquently arise and shout, "I call the defendant for cross examination under the statute." Consider the effect for just a moment. Your jury is fresh and alert and ready to give you its best attention. The defendant gets on the stand. He is the best prepared of all the opposing witnesses. He is violently antagonistic and will do his best to give you a bad time on your cross examination. If he is at all clever he is apt to give the jury a bad impression of both you and your case and, at best, the jury is left with an ejaculatory story which probably leaves it completely confused about the issues toward which you were driving, and somewhat bored with the whole thing. How much

better it is to call the opposing party for cross examination after your entire case is thoroughly imprinted on the minds of the jury. They can then see and understand the discrepancies which you are trying to point out. Bringing the defendant's cross examination in this fashion also has a tendency to take a great deal of the sting out of the defense, because here the opposing party's testimony is sandwiched in between a great weight of testimony favorable to you.

It might be well to inject a word of warning here that you can do a great deal better job of cross examining an opposing party and will be a great deal safer if you have already taken his deposition or at least a statement from him. A word here on the use of depositions in trial might not be amiss. If the witnesses or opposing party's answers are substantially the same as given in the deposition, don't make the mistake of referring them to the deposition and saying "Did you, or did you not make such an answer to such and such a question on such and such a date," as you are only emphasizing the veracity of the witness and bringing home to the jury the fact that the answer is probably true.

It may be necessary to call the opposing party for cross examination in order to prove some essential element of your case, but even if this be so it is usually not necessary to call him first. It is usually advisable where possible to sandwich your "short" witnesses between those who might be termed "transaction" witnesses, as this tends to prolong the jury's interest in the main story, and if your case is several days long it is a good idea to keep them for "spares" of which more later.

Don't Over Try The Case

Extended repetitious testimony only tires the jury and many minor contradictions may develop which some juryman will pick out and which will be the subject of a good deal of discussion or possibly dissention in the juryroom. You will know from your pre-trial conference the number of witnesses expected to be called by the other side and, therefore, will not run the risk of being outnumbered.

Don't call a witness if you think his testimony can not be finished that day. Use a spare. A moment's thought will show the reason for this. The jury leaves the courtroom for the day with the impression created by the testimony of the last witness, and if cross examination has created some disturbing effect which you don't have the opportunity to clarify by re-direct before adjournment then the jury wonders why on earth you ever called the witness in the first place. By morning their recollection of the distinct point will probably be hazy, but their general impression will be a bad one. Frequently a smart cross-examiner will purposely stall at the end of a day, if he has been able to create a bad taste in the jury's mouth, to keep you from re-direct examination. Sometimes he will also stall his cross examination to take advan-

tage of the evening recess to prepare further cross examination or to check up on factual material with which to further attack the witness. Thus, if you see that your time is growing short, rather than put on a "transaction" witness, use one of the "short, spare" witnesses which you have saved for this purpose.

No one agrees as to where the plaintiff's testimony should be used. Some excellent trial lawyers use it at the beginning of the case, some further on down the line and some like to conclude with the plaintiff's testimony. Obviously if your plaintiff is the only one who knows most of the transaction it will probably be necessary to call him as a beginning witness in order to present your case in natural and chronological sequence. If it is possible to use a strong witness other than the plaintiff as an initial witness, it would seem much better to do so, thus giving the jury the impression that it is hearing a less prejudiced presentation of all of the facts of the case.

Finish Your Case on a High Note

Many cases require several distinct lines of evidence, such as for example a personal injury accident, wherein you must prove liability, injuries and damages. Chronologically the liability must be proven first and so on down the line. Witnesses who helped the injured party, physicians and nurses who treated him (hospital records sometimes are helpful), the operating surgeon and an expert testifying as to permanent disability may be good as last witnesses for you to use if they are good witnesses. Here let me emphasize that you should get top flight men in any line if you can afford them. One orthopedist with a well-known reputation and fine background will be worth several general practitioners, who are not specialists, in impressing the jury. If a construction problem is at issue, get a good contractor who is well-known and has a wide experience in his field. This rule, however, like most, has some exceptions. If a personal injury case is being tried in a small town, the testimony of the physician who attended the birth of most of the members of the jury and nursed them through their childhood ills will stand up against the testimony of the most highly specialized medical adviser.

There were some specific points on which some discussion seems desirable. They will be discussed briefly as follows:

Stipulations between counsel as to facts should, in the writer's opinion be presented early in the trial, but be sure to read them to the jury. After all they do not become part of the record unless they are read into it, and they do have a tendency to carry considerable weight with the jury. In the heat of trial it is very easy to overlook these stipulations. Stipulations as to ordinances which are admissible are usually taken up at the pre-trial conference. They should be presented as your best judgment dictates, but again, read them to the jury. They should also be incorporated in the instructions. That way the jury gets them twice.

Depositions and their use have been discussed elsewhere in this series of articles, but some re-emphasis may be of help. First, don't use small variances, if they are inconsequential, in your effort to impeach. It makes you appear petty and has the effect of impressing the jury with the fact that these slight errors are only human, but that in the main the witness has related essentially the same story as he did some months before.

Where your witnesses are unavailable and it is absolutely necessary to use his deposition to get his testimony before the jury ask the court to rule on objections which have been made or are expected, out of the presence of the jury, so that the reading of the deposition to the jury will not be interrrupted by the recorded objections of counsel. If the deposition is read by one attorney only, read it slowly trying to be as fair as you can so as not to unduly emphasize testimony favorable to you. If you have co-counsel it is common practice to request the court's permission to let one lawyer take the stand to read the answers to the questions put by the other counsel. Again let us emphasize the jury gets from the testimony only that which is presented to it clearly and forcefully.

WRITTEN EVIDENCE

The presentation of written evidence sometimes presents problems. If it is evidence going directly to establish a claim or defense, presentation of it will depend upon when the proof is made as to its competency or relevency and its logical place in the chronology of events. If it is collateral to the main issues, as an impeaching statement, the particular circumstances will determine the time of its presentation. Technically, impeaching statements are admissible only as part of the evidence of the party by whom impeachment is attempted. The court can, however, in its discretion permit the introduction of such evidence during cross examination, and usually the courts will do this. However, if the court will not allow its introduction on cross examination don't forget to introduce it on direct, and don't minimize its importance by playing it down, or introducing it casually. Give it an important spot in your case and read it slowly, carefully and forcefully to the jury.

Questions put by jurymen of witnesses are sometimes extremely embarassing. You feel you cannot object to the questions for fear of antagonizing the jury. Probably the best way to handle this situation is to ask the court quietly to reserve your right to object subsequently to either the questions or answers out of the presence of the jury.

So much could be written on the subject of preparation of witnesses and their examination on both direct and cross examination that one hardly knows where to start. Here are a few suggestions, however. Prepare your witnesses with a general warning. Explain to them that the opposing counsel may possibly attempt

to get them to lose their tempers on the stand. Tell them to make their answers concise and direct and not to argue with counsel on either side. It is well to warn them not to be "smarty" in answering questions even if the attitude of opposing counsel is disagreeable. Warn them that if an objections is made they should stop talking immediately and wait until the court has ruled on the matter. A suggestion that they dress quietly is sometimes in order. Your own attitude toward a witness whom you are examining will, of course, be dictated somewhat by the type of witness you are working on, but in general it certainly pays to be courteous.

Many lawyers, in preparing for trial, prepare a full list of questions to ask each witness to bring out his case. This seems to be extremely good practice, particularly if you have not had much trial experience, or do not get into courts very often. The reasons therefor seem obvious. In the first place it gives you a chance to prepare questions which are not subject to objection and which will bring out the story in the most concise manner and best chronological order. Many times we have all seen examiners so upset by sharp objections that they will forget to go back to the same place and continue the line of questioning, thus omitting important factual testimony. If you have the list before you, you simply go back to the place where you stopped and continue from there. Your questions should be simple, concise and certain, not ambiguous or misleading and, by all means, stay away from legalisms or highly technical phraseology of any kind. This does not impress the jury and serves only to confuse and to embarrass the witness. Stay away from leading questions and such mannerisms of speech, as "Do I understand you to say?" It is asking a good deal of any witness to try to understand what is in a lawyer's mind. These things are bad because they provoke objections which tend to interrupt the continuity of the story that you are trying to present. Of course, when you are the one doing the objecting, that is a different story! Sometimes you may find it necessary to protect your own witness by objections. If you see that the witness does not understand the question, or is so emotionally upset as not to be able to give a correct answer, an objection and the resulting argument will sometimes give him time to collect himself and to realize that something important is in the offing.

Surprise Witnesses

One of the most disconcerting things that can happen to a trial lawyer is to have a witness whom he thought was entirely friendly and helpful to his side of the case, suddenly get on the stand, bare his teeth, and go completely over to the other side. In such a case you may allege surprise and ask the court's permission to cross examine the witness and ask him leading questions. Such a request is usually granted by the Court and under

cross-examination you may uncover the reason for the switch, which will do much to obliterate the harm done.

Your own attitude toward the court is one of the most important things for a lawyer to learn early and to keep in mind. Addressing remarks to opposing counsel is something that we should avoid as much as possible, but in the heat of a trial all of us are guilty of doing it. However, whenever you address remarks to the court, it should be done in a courteous manner. If you feel that the judge has not thoroughly understood the proposition presented by you, don't make the mistake of blurting out "You don't understand, judge," intimating by your remark and manner that you don't think he has sense enough to get the point. It is much better to phrase it something like this, "I am afraid I haven't made my position clear, your honor" and then proceed to try to pound into his thick head your view point of the law. Sometimes the court will cause you considerable embarrassment by attempting to take over the examination of a witness and by asking improper questions of the witness. In order to protect your record, it is absolutely necessary that you make an objection to the court's question. Usually you can do this deferentially with just enough detail to protect your point. If the attitude of the court is definitely antagonistic then you might just as well be vigorous, if you are right, and pray to Heaven that your cases fall in some other division until the court's wrath toward you has somewhat cooled! Many lawyers try their cases by heckling the other side, and some are very successful in upsetting and confusing opposing counsel to the extent that he is almost helpless. About the only way this can be combated with good effect on both the court and jury is by keeping your own attitude absolutely fair and courteous and not attempting to join in the heckling in retaliation.

Pictorial Evidence

Pictorial evidence in general is something that is sadly neglected by most plaintiff's counsel. The use of anatomical charts, road signs, photographs and moving pictures, maps, plats and surveys are all something that make an extremely strong impression upon the jury, and the use of all of them is perfectly proper, if they are properly introduced. Your photographs or moving pictures must correctly portray what they purport to represent. If changes have occurred, then they must be explained and the admissibility of the photograph or moving picture is in the discretion of the court. Enlargement of pictures are all right if they are properly authenticated. In identifying these photographs of pictures, create by your examination of the photographer the strongest possible impression of the skill and the fairness of both the photographer and the picture. Plats and surveys are identified in the same manner as photographs and moving pictures, and they must be accurate as to every detail they purport to represent. You should carefully choose the person who is to make such plat or

survey so that he will have no interest whatever in the case. The best practice is probably to get somebody out of the City Engineer's Office or a County Surveyor, or someone who has some standing in the community in which the case is being tried.

Police reports are held ordinarily not of such an official character to be admissible. Get the policeman to testify and let him refresh his memory from his report. If, however, the report is contradictory to his testimony, you may then use his report for impeachment purposes.

Hospital records are all right if they are authenticated, but sometimes this is an almost monumental test requiring the calling of diagnosing physicians, nurses who have taken down the doctor's statements, a recording agent and a record room custodian. It is much better if you can get a pre-trial stipulation that the records are admissible as such and then read them to the jury. Opposing counsel may put you to formal proof of city ordinances and then it is necessary to call the Clerk with the official records of the ordinances to testify in regard thereto. Here again it is wise to get a trial stipulation that such ordinances as are applicable shall be admissible, and this can usually be done without too much difficulty.

Receipted repair bills are evidence of the payment of such bill, but they are not evidence of the reasonableness of the charge, and unless counsel will agree on their admission, it is usually necessary to call someone who is expert in that line of work to testify as to their reasonableness. If they are not paid, of course, reasonableness must be proven.

With regard to expert witnesses, as stated above get the best specialist in the particular field in which you want him to testify. It is embarrassing and does a great deal of harm to your case if your expert, on cross examination, proves to be someone with no specialized knowledge of the events of which he is testifying. This, of course, is subject to the exception stated above. Never neglect to properly qualify your expert by going through all of his educational and practical achievements in order that the jury may be fully impressed with the quality of the opinions which he will give. It is a common trick of experienced practitioners to admit the qualifications of known experts to attempt to avoid the detailing thereof before the jury, and the unwary and inexperienced practitioner falls into this trap. In such case the jury gets no knowledge of the qualifications of the expert and thereby you lose much of the strength of his testimony.

ERRATA

In the October, 1951 issue of *Dicta,* the citation on page 378, line 10, should read "4 Federal Rules Decisions, page 374" and the footnote on page 382 should read "1 F.R.D. 411".