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THE DEFENDANT IS READY

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Previous articles have discussed how to prepare for trial, the taking of depositions, the selection of the jury and the putting on of the plaintiff's case. The plaintiff has rested and counsel for the defendant now is ready to proceed with the defense. The various articles have been based upon the assumption that the case at hand is a damage suit arising out of an automobile accident. Proceeding with that assumption, we assume that we may then proceed still further and say that counsel for the defense is not only representing the defendant of record, but is also representing an insurance company.

In one of the previous articles it was stated that unless you won at least 50% of your trials you were not a very good attorney. We cannot agree with that statement, particularly if you are counsel for the defense, and there is an insurance company involved. We must be practical in these matters. One of the articles has indicated that it isn't right or proper for counsel for the plaintiff to ask each and every juror if they are stockholders, policy holders, or employees of some particular insurance company; that the proper way is to simply ask a general question of the entire jury panel, and even then not mention the insurance company involved.

We attorneys for the insurance companies wish that that was the law, but it is not. Our Colorado Supreme Court has held that not only is it proper to ask the "insurance question" as to an individual company of the jury panel generally, but such question may be asked each and every juror. As long as you are representing a plaintiff, I think you not only have a right to, but should ask that question of every juror. I appreciate that my insurance defense colleagues will rise up in arms against such a statement, but as stated, we must be practical in these matters and if the Supreme Court says you can ask such a question, then you should do so. We of the insurance counsel will have to make the best of it.

It has always been my feeling that the plaintiff and plaintiff's counsel have a great advantage in a law suit. First impressions count a great deal and the plaintiff has that advantage. Plaintiff's attorney gets the first chance at the jury on the voir dire examination, again in the opening statement, and still again in putting on the evidence and then, of course, when it comes to final argument plaintiff's attorney not only opens the argument, but closes same. It will thus be seen that the defendant is the center of the sandwich—should we say the bologna.

The plaintif has put on his case in detail. Plaintiff has been building up a case. The defendant, in turn, will then try to tear

it down. It is my opinion that the defense should pick out the important points of the case it wants to stress, and stress those points overlooking as much as possible the minor details and the immaterial points. In other words, the defense should be short and concise.

As the articles prior to this time have had to do primarily with the plaintiff's case, there are a few thoughts I would like to convey to you regarding the action of the defense during the time the plaintiff's case is being presented to the jury. In the first place, there usually are several witnesses such as the police officers, who are really disinterested witnesses, and might be called by either the plaintiff or the defendant. A smart plaintiff's attorney generally calls these witnesses as his witnesses trying to impress the jury with how many witnesses the plaintiff has. In the opening statement to the jury it is desirable for defense counsel to advise the jury regarding this situation, and point out to them that the mere fact that the plaintiff called these witnesses does not make them "plaintiff's witnesses."

Many plaintiff's attorneys call the defendant for cross examination, under the statute. I am always delighted when this occurs. If my client cannot tell a straight forward story under cross examination, then he doesn't deserve to win. In preparing for trial defense counsel should always be sure that the defendant is ready and prepared to testify if called by the plaintiff.

LIMIT OBJECTIONS

During the presentation of plaintiff's case, defense counsel should be careful not to over object. In other words, don't object to questions propounded by plaintiff's counsel unless, first, you feel that the answer is going to be detrimental to your client and, second, unless you are reasonably sure that your objection is good. Continual objections by defense counsel leads the jury to believe defendant is guilty and is trying to keep the plaintiff from showing same by the evidence.

Cross examination by defense counsel should be given most careful consideration. While it is true, as stated by one of the other speakers, that most cases are won on direct testimony, still cross examination is probably the greatest weapon the defendant has. It has been my practice to make my cross examination as brief as possible and to only cross examine on those points which in my opinion are the vital points of the case. In other words, be careful not to, by cross examination, have the witness repeat plaintiff's theory of the case over and over again. The defense has certain points it wants to bring out and those are the only points that the cross examination should be upon.

You have heard the oft repeated statement that the best rule to follow in cross examination is not to ask any question the answer of which you do not know. That is a fairly good rule to follow.

Another thought regarding cross examination is the use of statements or depositions. We believe that you gentlemen who have had cases against our office realize it is a paramount rule of Wolvington and Wormwood that we take the deposition of opposing parties prior to trial. The purpose of this is two fold. First, you have the plaintiff tied down to a sworn statement and, second, you know just what plaintiff's case is all about and know whether you should proceed with trial or attempt to settle the case.

If you have proceeded to trial and the plaintiff then attempts to change his story you can use the deposition to great advantage. I recently tried a case in which the plaintiff, at the time of trial, changed her story. I then had her deposition marked as an exhibit, cross examined her on same and had the deposition introduced into evidence. The jury returned verdict for the defendant and the Supreme Court, in affirming the jury's verdict, pointed out that plaintiff's story at the time of trial was different from that given in the deposition and it was for the jury to determine at which time the plaintiff was telling the truth.

MOTIONS TO DISMISS

We now come to the point in the case where the plaintiff has rested and the defense starts into action. The first question to be determined is whether or not you should make a motion for Judgment of Dismissal, as authorized by Rule 41, or a Motion for Directed Verdict, as authorized by Rule 50. I appreciate that many attorneys make such a motion as a matter of course, even though they know they are not entitled to same. I do not advocate such proceeding. In the first place we are officers of the Court and in fairness to the Court we should not make motions which we know have no merit. Further, if you continually make such motions when they have no merit, the Court will get to the point that it will take such motion for granted, and will not listen to you even when your motion is meritorious. In other words, you can cry wolf too many times. I, therefore, say don't make motion for either Judgment of Dismissal or Directed Verdict unless you are reasonably sure that the motion is good. Even if the motion is good, it may be that you will not want to make the motion for several reasons.

First, and as I have previously stated, we must be practical in these matters. It is my opinion that the Supreme Court looks with disfavor upon such motions. The decisions of our Supreme Court in the last few years lean more and more to reversing these cases which have been decided on such motions. The Court seems to feel that if there is any evidence at all the matter should be submitted to the jury, consequently, if you have a good case and if you feel that the jury is leaning your way you probably would not want to make such a motion.

Even though you feel the motion is good and you make same, it might be advisable to suggest to the Court that the Court with-

hold its ruling until after the matter has been decided by a jury. In that way, if the Court then grants your motion and sets aside the verdict, and the Supreme Court should hold that the motion should not have been granted, you are in a position where you have the jury's verdict to fall back on and don't have to try the case over again.

In setting forth the evidence for the defense it should be borne in mind that the defense is really in three parts. First, you have the question of liability. Second, the question of plaintiff's damages, and third, a counterclaim. As regards a counterclaim may I suggest that it has always been my feeling that you should not put in a counterclaim unless you honestly feel that your client is reasonably entitled to same. Putting in a counterclaim when you have no grounds for same may act as a boomerang.

Your main objective in representing the defendant is to obtain a defense verdict if at all possible, provided same can be obtained honestly and fairly. If you can't obtain defense verdict then you want to hold down the damages as much as possible.

You may get one or two jurors who feel sympathetic toward the defendant, and even though these jurors cannot convince the other jurors that the verdict should be for the defendant, they can hold down the amount of the verdict considerably.

DEFENDANT'S EVIDENCE

We now come to the evidence to be produced by the defense. In putting on the evidence we must bear in mind that we don't want to strengthen the plaintiff's case by repeating over and over facts favorable to the plaintiff.

The purpose of defense witnesses is to stress those salient points which the defense believes is in its favor. At the same time, while there undoubtedly has been sympathy established for the plaintiff, who has been injured, if possible, the defense should try to establish some sympathy for the defendant. This, of course, depends on the particular facts in each case.

Probably the first question to be determined, as to the evidence of the defense, is just what evidence to put on as regards the defendant himself where the plaintiff has already called the defendant for cross examination. Certainly, if the plaintiff's attorney has cross examined the defendant at length regarding the facts of the accident it is inadvisable to have the defendant go over those facts again. My thought is that it is much better to put the defendant on the stand and have him simply repeat those important points which are favorable to the defense.

At this time it should be stressed that the defendant is probably going to be the best witness for the defense. He is the one that is being accused. Be sure that your defendant is familiar with all the facts and is prepared for any contingency under cross examination. This, of course, is a big order.

An attorney may talk to his client for hours and yet may miss

the one question on cross examination that may decide the case. Let me give you an example. Many of you remember James Parriott, now deceased. Jim had been City Attorney here in Denver and later was in private practice. We are sure that if Jim were living he would appreciate this situation as he did after the trial, and when we discussed it with him.

Jim was involved in an automobile accident in which he took the right-of-way from the plaintiff, seriously injuring the plaintiff. We were defending Jim and our first defense was, of course, contributory negligence; contributory negligence being excess speed on the part of the plaintiff. Jim had made an excellent witness for himself and when we were through examining him we turned him over to opposing counsel, Frank Mannix, now deceased, with a great deal of confidence. Jim and I had gone over the case thoroughly and I was satisfied that he would stand up under any type of cross examination.

Frank Mannix slowly rose to his feet, looked over at Jim and said, "Mr. Parriott, are you familiar with the right-of-way ordinance in Denver?" and Jim, throwing back his shoulders said with a great deal of pride, "familiar with it, I wrote it". Mr. Mannix looked at the jury, smiled and said, "no further cross examination", and indeed, no further cross examination was needed. The verdict was for the plaintiff for a substantial amount.

POLICE OFFICERS

After the defendant has testified it then, of course, becomes incumbent upon the defendant to produce his other witnesses. Police officers are always valuable and particularly so if they have not already been called by the plaintiff. If you can get them to appear in uniform that is helpful, and where the plaintiff has not called them the jury gets the impression that law and order is on the side of the defendant.

You will, of course, have medical witnesses, and it has been stated by one of the prior speakers, be sure to get the best. They won't charge you any more as expert fees than the others and they will be most helpful in presenting your defense. You don't have to worry about medical experts. They are used to testifying when it comes to cross examination. You will find that these medical experts know how to handle themselves under cross examination, and when plaintiff's attorney gets up to cross examine your medical experts you can sit back and relax.

If some of your witnesses are not available and you have taken depositions, then of course these should be introduced in evidence. There are various schools of thought as how to read these depositions, that is, whether to have someone sit in the witness chair and you read the question and the other party the answers, or whether counsel should read both questions and answers. I, personally, like to read the entire deposition to the jury for obvious reasons.

On the other hand, if opposing counsel is reading the deposition of the witnesses I always insist upon being allowed to read my own cross examination.

Photographs are extremely helpful to the defense as to the plaintff. A jury can hear many words regarding the location of an accident, or other matters, but a picture showing the location speaks louder than many words. Our Supreme Court has even held that it is permissible to take pictures of the scene of the accident and place cars in the position that a witness claims that they were in at a certain time, and that such pictures are admissible in evidence.

PRODUCE EVIDENCE AS TO DAMAGES

When it comes to the question of damages, we believe the defense should bear in mind that the jury may disagree on the question of liability and thereupon reach a compromise verdict wherein they find for the plaintiff for a smaller amount than would ordinarily be awarded. Having in mind that this may occur, the defendant should get into evidence, if possible, testimony holding down the damages as much as possible so that you will not be faced with a motion by the plaintiff for a new trial on damages alone. Our Supreme Court has held that if it appears clear that the question of liability was first determined by the jury and that they then came to the question of damages, and that the damages are inadequate, a new trial on the question of damages alone will be granted.

Our Supreme Court has further held that affidavits of the jurors will not be admitted to impeach the verdict or to explain the same. Consequently, you can't resist Motion for New Trial on the question of damages alone by submitting affidavits of the jurors that it was a compromise verdict which would mean, of course, that if the new trial was to be granted it would be granted on all issues. Let me assure you you have not gone through the agonies of hell until you have had the Court grant the plaintiff a new trial on the question of damages alone and have then had to retry the case, at which time you sit and listen to the Trial Court advise the jury the question of liability has been determined and the only question for them to determine is the amount of damages.

Then the fireworks begin. We have no advice for the attorney for defense in a situation like this except to pray for the best.

It has become a common custom, by reason of the pretrial conference, for defense counsel to stipulate that the medical and hospital bills incurred by the plaintiff are reasonable and that they may be introduced into evidence without further proof. Defense counsel should be careful regarding this situation in that he should be sure that the jury understands that by admitting the bills are reasonable he has not admitted liability for the accident.

This can be taken care of at the time the stipulation is read to the jury and, of course, can be further taken care of in argument

to the jury. This may seem unimportant, but I have had two occasions when it became very important. Once after the verdict of the jury had been returned we discussed the case with some of the jurors and learned to our amazement that they felt we realized the defendant was to blame for the accident because we had stipulated as to the medical and hospital bills.

Another time, and fortunately this does not happen very often, an attorney in his zeal to represent his client, in arguing to the jury made a statement substantially to the effect that if the defendant didn't think he was to blame why would he agree as to what the expenses were.

After all the defense evidence is in and the defense has rested, the plaintiff then puts on his rebuttal. Of course the plaintiff on rebuttal is again trying to impress the jury with what the plaintiff's side of the case is, and in my opinion the defense should not cross examine these rebuttal witnesses unless absolutely necessary. In other words, do not prolong the rebuttal testimony, but get it over with as soon as possible so that the defense evidence is still in the jury's mind.

While some of you readers are older attorneys, experienced in trial work, many are either young attorneys or law students. With the permission of the older attorneys I would like to close my remarks with a few general statements to these young men.

TENSIONS OF TRIAL WORK

Some of you have never tried a jury case. Others have only tried two or three. Undoubtedly all of you are extremely nervous as you are getting ready for the trial, and go into trial, but you should bear in mind that your opponent is just as nervous as you are. Just a short time ago I was trying a case against an attorney who, in my opinion, is the outstanding jury trial attorney in Colorado. While we were waiting for the Court to convene I asked him if he ever got nervous before a trial, to which he replied that he was nervous right then; that irrespective of some twenty-five years of jury trials he still was always nervous when he entered a case and often wondered why he had ever taken up the practice of law.

In my opinion, nervousness is an attribute to a trial attorney. When you cease being nervous over a trial your efficiency has certainly been cut down considerably.

During the trial be sure to show attention to your client. Let the jury know you are representing an individual and that individual has rights. Let the jury see you discussing the case with your client. Let them know you have your client's interest at heart.

During the trial you should also remember that you are an officer of the Court; that you should not try to deceive the Court; that the Court and the jury are not as familiar with the case as you are and it is your duty to let the Court and jury know just what the facts are and what the law is.

Many defense attorneys try the defense on the theory that they are preparing their record for appeal. That is all right in its place, but don't overdo it. Don't worry too much about the appeal. Remember that you are in the case primarily to win the case in the first instance, and do everything in your power which is fair and honest to win the case in the lower Court. Worry about the appeal after the trial is over.

Don't be too disturbed when you lose a case. Juries are unpredictable. Some sage has stated there are two things which are beyond understanding. The first is why a woman married the man she did and the second why a jury returned the verdict it did.

When you do lose, be sure to congratulate your opponent. He likes to win just as much as you do and when you win you like to be congratulated. Unless you are man enough to congratulate your opponent when he wins, do not expect your opponent to congratulate you when you win.

I have often told my associates that if I ever wrote a book regarding my limited experiences in the defense of damage suits, that I would probably have to entitle it "Sitting At The Defense Table And Hearing The Clerk State, 'We the jury find the issues in favor of the plaintiff' ". Regardless of that, I have had a theory which I believe could be adopted by you young men. This theory was the one of Tommy Hitchcock, undoubtedly the world's greatest polo player, being "lose as if you liked it and win as if you were accustomed to it."

WANTED!

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