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I would much rather see the successor do more than might be required than to stop short and have the sufficiency of his investigation questioned by the beneficiaries. It would be far better to settle all questionable matters at the time the successor takes office than to play ostrich and learn at a later date that the accounting decree is not binding in whole or in part.

No attempt has been made to deal with the special problems existing with respect to specific relationships. For instance, the testamentary trustee in taking over from the executor has some problems slightly different than the successor trustee under an agreement. Fundamentally, however, all successors, regardless of relationship, will have substantially the same duties.

There are, of course, many other duties and problems facing a successor which I have not touched upon. The successor will frequently have a question as to whether the vacancy in office legally exists or whether he will inherit the powers granted to his predecessor. He also may have questions of construction or interpretation of the trust instrument or be required to pass on the validity of the trust created.

The Time to Consult With Your Trial Lawyer Is Before Your Decision to Go Into Court

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The important service that can be rendered by the jury trial lawyer as a pre-trial counsel in helping his client select the cases that can be litigated with safety, as well as with some degree of success, is often not fully understood or appreciated. My remarks on this topic find their source in my many years of courtroom experience and the impressions and conclusions that have come out of that work. My trial experience has been varied and extensive and much of it in the defense of railroads and insurance companies, yet I have emerged with confidence in the jury system as the best method for the determination of fact issues.

This discussion will be concerned primarily with the thought that most corporations, confronted with the usual volume of lawsuits, do not make wise use of the valuable service that a safe trial counsel can render to them in making the important decision whether a serious controversy shall or shall not be litigated. Life insurance companies are no exception and perhaps suffer more from such neglect. Company personnel are prone to feel that the trial lawyer has no value outside the courtroom. On the contrary his greatest service to your company may be rendered long before the day of the trial.

What are the qualifications of a safe trial counsel? Immediately we think of two. First, he must be an educator. Second, he must be a salesman. I have not overlooked the fact that he must also be a good lawyer but we are concerned here with the added qualifications he must attain before he

becomes a safe trial counsel. Inspiration plays only a small part in his development and ability to acquire these added talents. Perspiration and experience become the final test.

In referring to a trial counsel I have in mind chiefly the jury trial lawyer. A large percentage of cases for trial are based on fact issues or mixed issues of law and fact and the trial lawyer must not only be well grounded in the law, but must have acquired through experience, a sound understanding of the determination of fact issues by a jury. The right of trial by jury is one of the cornerstones of our Democracy. Yet, it is not fully understood and often quite universally feared by industry. The lawyer with constant and almost daily contact with the jury in the courtroom becomes qualified to counsel when that constitutional right can be wisely used.

With so many insurance cases involving fact issues, you cannot ignore the jury when you decide to litigate. Juries are usually a cross section of the people in the community that we deal with in our everyday work. To dignify them as jurors does not imbue them with any particular intelligence or ability to deal with fact issues. They must be talked to in the language of the street if we are to expect them fully to appreciate the duties that the law imposes. The lawyer may enter the courtroom fully prepared on every issue in his case. But every good trial lawyer knows such preparation avails him nothing without the further appreciation that thirteen people in the courtroom, who will judge and determine his case, know nothing about that case and depend entirely on his ability to bring enlightenment and understanding into minds that are otherwise ignorant of the issues. The trial lawyer knows he is doomed to failure unless he can teach the members of his jury to know and understand his side of that lawsuit even as he knows and understands it when he enters the courtroom.

Safe Trial Lawyer Makes Luck

Some trial lawyers may pride themselves in their ability to select favorable jurors. In this lurks the element of luck of finding favorable jurors in the pool from which he must select the twelve triers of fact. We may all recognize the element of luck but again the safe trial lawyer usually makes his own luck. He must develop an adroit skill in presenting his evidence through the witnesses in a story form that becomes pleasing to listen to, as well as instructive to the jury. The real test of the trial lawyer is not whether he knows his case, but whether his jury knows it as well as he does when they finally retire to render a verdict.

Often we hear the poorly prepared lawyer explain an adverse verdict with the remark, "what can you expect from a dumb jury." In all probability the lawyer himself was not adequately prepared to educate the jury to consider intelligently the fact issues in his case. He may not have appreciated his own duty in that respect. He has no right to expect an intelligent verdict. His own incompetence may cause an otherwise intelligent jury to emerge with a perverse verdict:

A good trial lawyer knows that even without any neglect of his own, a jury may go wrong and a verdict have to be corrected by the court. He also soon learns that there is no such a thing as an impartial jury. Every juror, and perhaps here we should include the court, views and analyzes a set of facts in the light of his past environment and experience. The trial lawyer must not only overcome such prejudice, but must also aid each juror intelligently to understand the problem in each case in the light of his past environment and experience. He knows that if he fails in that function, honesty demands that he himself assume the responsibility for an adverse verdict. He is, therefore, less prone to criticize our jury system. He views the jury as twelve persons of average intelligence rather than scrutinizing it as twelve persons of average ignorance. We should all profit by this and learn to better understand and make more intelligent use of this basic constitutional right of trial by jury.

It is by no means hopeless for a defendant corporation to try a case to a jury. Many such cases are won. Trial by jury should not be feared but on the contrary its danger and its value in each particular case must be understood. Wise use of this right should be cultivated.

On the other hand the value of salesmanship is well known to the insurance company but it is not fully appreciated that the trial lawyer must be a good salesman to be successful. Both judges and lawyers stress the importance of the oral argument at the conclusion of every case. In that argument the trial lawyer must sell to the jury the theory of the case that he has just spent days teaching them to thoroughly understand. He must convince them that his teachings have been sound and that his conclusions must now be accepted by them. These are simple basic principles that I am sure every insurance company would require of its underwriter. He would first be instructed to educate the prospect on what he has to sell and second to sell that prospect the contract that will fill his needed protection. The insurance lawyer must sell the issues and equities in his case to the jury. He can never expect sympathy to weigh on his side. That is a weapon of the plaintiff. To combat an appeal to sympathy, the defense lawyer must stimulate the desire of the jurors for knowledge of all the evidence and then draw a reasonable conclusion acceptable to them. His appeal must be to the intelligence and not to the ignorance of the triers of fact.

Ability as Educator Counts

We think of many other qualifications for the trial lawyer, such as understanding jury psychology, knowledge of human nature, or skill in cross-examination. But these are only part of his ability as an educator and his power to influence by his final argument.

I hope I have at least left with you the impression that a good trial lawyer is not just some one that is admitted to the bar; or some one with a profound knowledge of the law; or some one capable of making fine distinc-

tions between legal principles; but rather like the specialist in certain branches of the medical profession something has been added to his general makeup as a lawyer. He possesses qualities that are not taught in the classroom. Through long experience he has acquired talents that make clients seek his skill when they are confronted with a courtroom contest.

Here we are not concerned so much with his ability in the courtroom, but with the fact that his years of experience have added to his stature as a pre-trial counsel. He displays a sound judgment of the kind of evidence and fact issues a jury can be taught and made to understand in the courtoom, coupled with a knowledge of whether the conclusions to be drawn from that evidence, can be sold to a jury and result in a favorable verdict. When he has demonstrated his ability to influence juries to bring in verdicts in favor of his client, his greatest value to that client may be in the selection of the cases that should be litigated.

I fear that many insurance companies have overlooked the value of their trial lawyer as a pre-trial counsel. The decision to litigate a controversy is too often made by a layman or a group of laymen, perhaps with the aid and advice of a counsel without any courtroom experience. These cases are then referred to a trial lawyer with the usual suggestion that he should have no difficulty winning them, although he has never been consulted about the file. It is no wonder that when a file like that comes to the trial lawyer's desk he reads it with a feverish hope of finding some human interest facts that will grasp the attention of the man on the street and at the same time present equities that will appeal to his sense of fairness and justice.

Litigation is important to the life insurance company, whether the company is large or small. It is difficult to evaluate this importance and often it is overlooked or ignored entirely. I suggest a few elements to be considered.

Litigation is expensive when the case is won. It is doubly expensive when the case is lost. It often becomes irritating and absorbs valuable time of personnel from other duties. It may do irreparable damage to public relations. Finally an adverse decision may create a precedent and do serious injury to the entire insurance industry.

The decision to litigate a controversy should not be treated lightly. Certainly the decision should never rest on the whim, caprice or even the justifiable anger of the person in charge of the case involved. If that responsibility rests with a single person, or with a group of persons in your company, it should not be exercised in relation to an important case without first seeking the counsel and advice of a competent trial lawyer who has had the opportunity of reviewing the facts and issues in the file. Before any decision to litigate becomes final, the experience of years in the courtroom should first be brought to bear on the facts and issues involved and an opinion based on such experiences should be calmly and carefully considered before you say, "Litigate This Case!"

Seek Advice of Trial Counsel

The suggestion may be made that corporations, such as insurance companies, most often are defendants in an action. It is not uncommon to hear the expression, "We have been sued. There is nothing we can do about it except defend ourselves in court." There may be cases that fall in that classification and the defendant company is helpless. Such a case rightfully should be referred to the trial lawyer at once.

I am thinking of the cases, however, where the company has denied liability and practically invites a lawsuit. Did that file contain the opinion of a trial counsel or was liability denied without the benefit of such advice? Also there are cases where effort has been made to settle. The negotiations may have broken down. Many reasons may bring that about but a common one is difference of opinion between the claimant and the company representative on the amount to be paid in settlement. Technically your representative may be right but the case may be difficult and expensive to try and even have the danger of establishing bad precedent. The negotiations should not be broken without the advice of a trial counsel. Perhaps the final effort to compromise should be made in his office and his advice then followed whether to settle or litigate.

This is no reflection on the lawyer in your company without trial experience. He fills a very important place. His knowledge of legal principles and precedents may be boundless. Industry must steer its course between the buoys of legal precedent. The insurance industry needs no reminder on how it was guided by the precedent of *Paul vs. Virginia 8 Wall. 168* (decided in 1869) for seventy-five years when suddenly the case of *U. S. vs. S. E. Underwriters Association et al 322 US 533-64 S. CT. 1162* (decided in 1944) was decided by the U. S. Supreme Court holding that insurance is interstate commerce.

The value of Stare Decisis was well expressed by Mr. Justice Roberts in his dissenting opinion in the case of *Mahnich v. Southern Steamship Co., 321 U. S. 96, 64 S. CT. 455* (decided in 1944) as follows:

> "The evil resulting from overruling earlier considered decisions must be evident. In the present case, the court below naturally felt bound to follow and apply the law as clearly announced by this court. If litigants and lower federal courts are not to do so, the law becomes not a chart to govern conduct, but a game of chance; instead of settling rights and liabilities it unsettles them."

It is the function of the law department of any corporation to steer a safe course of business conduct by the light of legal precedent. There are times, however, when a stubborn adherence to a rule of law become disastrous. It may be like the motorist who insisted on his right of way at the intersection. Of course he was dead right but he was just as dead as if he had been dead wrong.

Law Suit Must Have Sales Appeal

Law is an inexact science. It has its source in human conduct. Its rules are formulated by human concept. It is interpreted and administered through human understanding. It often has to be viewed and applied in conjunction with facts that are the outgrowth of human conduct. A large number of life insurance cases involve fact issues and consequently are in this realm of the indefinite. It would appear only reasonable that the lawyer who has spent years in the courtroom observing this human conduct of both judge and juror, in making final disposition of litigation, should be able to give valuable pre-trial counsel in distinguishing the cases that can be successfully sold in the courtroom from the cases that should be compromised and closed.

The sales appeal of a lawsuit must meet the same test as an insurance policy. A cross section of the public becomes the final judge. Sometimes when an insurance company is about to launch a new form of insurance protection, it seeks the advice of its expert field underwriters. These men may counsel against the proposed policy contract on the ground that the public will not buy it. If the public will not accept a policy of insurance, it matters little what protection it affords. Likewise if that part of the public we call a jury will not accept your theory of a lawsuit, it makes little difference how many technical legal rights it may contain. No one can be an accurate judge in this most indefinite field of speculation. I only submit that years of contact and experience with the operation of our right of trial by jury inoculates the trial lawyer with a peculiar sense of judgment of the kind of evidence a jury will reject or accept in support of a verdict. The value of that experience and judgment should not be overlooked but wisely used before any important controversy is permitted to reach the courtroom. When a case is once in court the die is cast and it is difficult to back up again to the stage of negotiation.

The expense of procuring a trial lawyer's advice and opinion on so many cases that may never reach his desk for trial may come to mind. The importance of the case must be carefully considered before his opinion is sought. Wise use of his time must be made. The expense of litigation, however, may well warrant some expense to avoid it. It is also vexatious and may absorb the time of personnel in your company to the extent that efficiency and production is materially reduced or may even temporarily break down.

Here I am reminded of the manufacturing plant working at top production but dependent on the efficient operation of one large piece of complicated machinery. Came the day when that machine broke down and all production ceased. All the engineering skill in the plant was unable to make it function. The chief executive frantically asked members of his staff if they knew anyone who understood the complicated workings of this machine. It was suggested that in the next town, about ten miles away, lived an old gentleman, an expert mechanic, who had helped install the machine. Hurriedly he was contacted and rushed to the scene. He made an inspection and

asked for a hammer. He tapped a few times with the hammer and then asked the chief engineer to start the machine. The plant was immediately back in production. Soon the company received a statement from the old gentleman for services rendered in the sum of $150.00. The same chief executive became very indignant at the amount charged for only a few minutes work. He demanded an itemized statement. It was sent very promptly and it read as follows:

To tapping with the hammer	$ 2.00
To knowing where to tap with the hammer	148.00
Total	$150.00

Knowledge, experience and good judgment are all intangibles of little or no value when they lie dormant. When in use their value can be measured only by the results produced. When we are in search of knowledge it is often the knowledge possessed by some one else. It requires wisdom and sound judgment to wisely use and benefit from the knowledge and experience of other people. I merely suggest that the trial lawyer by the very force of circumstances of his work in the courtroom, has acquired an added experience that assumes a real value outside the courtroom. Its wise use by your company is worthy of exploration.

Public Relations Enters Picture

Litigation assumes greater importance to the life insurance business than it does to any other line of business. Insurance renders a public service and insurance companies are "public relations" conscious. They strive for benign understanding and friendly acceptance and approval by the public of whatever they do. How a controversy between the company and a member of the public is handled during the stages of negotiations is very important. But when it reaches the courtroom it is under the critical eye of persons who will judge the evidence of your actions. It will be discussed by many persons and often subjected to the spotlight of publicity. It may even be immortalized in the opinion of the high court. It then becomes very important for equity to weigh strongly on the side of the company. Public relations may profit if the case is won. The injury it sustains in the event of loss cannot be measured. It will probably have some relationship to the manner in which the case was conducted and the extent to which the trial lawyer created an understanding of the issues and sold to the jury such equities as existed in the case.

It is not my purpose to discuss public relations at length; just to point out what litigation may do to it. A lawsuit is usually action from start to finish and is viewed by the public as a portrait of your company policy on the issues involved. You cannot advertise yourself into good public relations. It does not consist of publicity, good or bad, or just something you can tell the public. It is to a very large extent what you do to the public. If they like what you do, you can talk profitably about it. If they don't like what

you do, anything you say is not likely to change the picture. When you litigate you are usually in controversy with a member of society and your ability to show the community that your position is right is vitally important. It is unreasonable to expect that all lawsuits should be won, but it is fair to expect that every case selected for litigation must present equities that will appeal to a jury's sense of justice. It is then possible to lose the battle and still retain public approval. When so much depends on what you do to the public in the courtroom, extreme caution in the selection of cases to be there presented cannot be ignored.

The success of business does not depend to any great extent on any system or program that may be in operation. Business growth and expansion relies upon the intelligence, vigor, vision, and integrity of its management. Wise selection and use of men possessed of certain knowledge and experience weighs heavily on the side of success of any industry. Life insurance, so dependent on public interest, public service, public acceptance and approval, should be foremost to search for and explore the latent talents of men whose knowledge can be wisely used. It is such a thought that prompted this effort to point out that experience in the courtroom carries with it the ability to counsel when to avoid the dangers of trial and when to seek the advantage of that right.

Book Review

PEOPLE'S COURT, *by Edward C. Fisher, Judge of the Municipal Court, Lincoln, Nebraska,* published by the Northwestern University Traffic Institute, Evanston, Illinois, 1947. Price $3. 164 pp.

Ever since the publication of George Warren's *Traffic Courts,* there has been an acute need for a volume written by a traffic court judge which would be of assistance to other judges of courts with jurisdiction over violations of the motor vehicle laws.

Warren's book, fortified by an intensive nationwide survey, was the first definitive work on the subject. It was written from an objective viewpoint, which served to point out the general ineffectiveness of the courts in this field. Judges and prosecutors welcomed this important work which marked the beginning of activity under the national program for improving traffic courts, undertaken jointly by the American Bar Association and the National Safety Council.

Approximately 300 traffic court conferences have been held throughout the country, and these served to demonstrate that judges everywhere were vitally interested in exchanging information on their experiences in the court room, the handling of different types of violators of traffic laws, the proper relationship between the traffic court judges and other public officials, and methods used in arriving at proper fines and penalties. One of the earliest supporters of this type of conference was the author of the volume under review.