THE TRIAL COURT

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This meeting to me represents the realization of a proposition for which I have always stood; namely, that the law schools should teach the law students something about litigation. No lawyer can be a lawyer in the true sense of the term unless he knows the problem of litigation. And I mean the problem of litigation in the trial court, the problem of litigation in the appellate court, and in Chief Justice Schaefer's court. How can a lawyer even advise a client unless that lawyer appreciates the problems which go with litigation? If you are to be lawyers in the true sense of the word, learn as much as possible about this problem.

A medical student does not go into the world and perform an operation on someone merely from the knowledge he obtained on surgery out of the textbooks. He has worked in the laboratory; he has assisted and has participated in operations. That is where he gets his working knowledge. And there is a laboratory for all of us students of the law, and we must remain students as long as we practice—that laboratory is the courtroom. And I think it characteristic of the progressive nature of the University of Chicago in seeking to bring the laboratory of the law to the law school. It is much like meeting the mountain, since the mountain cannot be brought here.

Now, of course, we are back in the trial court. The case has been reversed and remanded for trial by the Chief Justice.

The most important phase in the trial of any case is the preparation phase, and that facet is accomplished without the confines of the courtroom. Ninety per cent of all cases tried, in my opinion, are won or lost outside the court-

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room. All cases are factual situations, and unless we the lawyers have a comprehension of the facts and an understanding of what the facts represent, we cannot truly represent the cause. How do you get the facts? The most fruitful way, in my opinion, at the cost of reiteration, is through interviews with and signed statements from any person who might be a witness whether that person is favorable or adverse to your cause, or whether he or she professes to know nothing about it. Obtain a statement of what they know, or a statement to the effect that they do not know anything of the matter in question. The negative statement will save you the embarrassment of being confronted in court with a person full of knowledge concerning factual matters when you were led to believe that in an out-of-court interview that person had no knowledge whatsoever concerning that about which he or she testifies. A signed statement is the circumscription of a witness' ability to testify in court. It is an insurance policy that a given witness cannot violate the contents of the statement without running the risk of being plagued by it.

Of course, you students are familiar with discovery devices. I am not going to spend any time discussing this. Never, however, lose sight of the proposition that the facts in any case are the most important part of that case. Indeed, I am sure the Chief Justice will agree with me on that statement.

After you have completed your factual survey, it is usually well to confer with your client. Your investigation might have revealed things which apparently contradict what he has previously told you. In an interview with him, you can ask him about these apparently contradictory matters. Frequently, he will have a valid explanation, yet, if you were to go to court with that explanation, you would be in no position to explain the apparent contradiction for others. "Facts do not always interpret themselves," and a trial is a classical interpretation of facts.

Your preparation should also concern your own knowledge. In almost every lawsuit there is some scientific or commercial matter involved. Thus, if it is an accounting situation, or a medical case, or litigation involving dynamite, do some work on it. Go to the textbooks and the appropriate journals. Then when in conference with an expert, upon whose knowledge you wish to draw, tell him your understanding of the problem and ask him if it is correct. With that fundamental knowledge which you have already obtained by your own work, you will find that your concept of the problem is readily made clearer. This is very important. Shall we call it "self-preparation on the meaning of the facts in a given case"?

Know, too, the law of the case. Know what you have to prove in order to make out the case. If you represent the defendant, know what the plaintiff has to prove in

order to establish an issue of fact against your client. Unless you know the law of the case, you will be uneasy throughout the trial. You will find yourself at sea because of ignorance of those matters which must be not only stressed but illustrated. Without knowledge of the law of the case, you do not know what is necessary evidence. Perhaps the proof is within the words of the witnesses you have called. Yet, you may not inquire. The result? Your case may fail for want of proof.

In the law school they probably tell you much about the law. All I can say is always remember the law as applied to the facts is the essence of each lawsuit.

That which at all times dominates the conduct of the advocate is best summed up in this query: What will its effect be upon the jury? This thought is paramount in the advocate's mind when he decides whether he shall accept a given case and follows him albeit subconsciously throughout the trial.

A lawsuit is a problem with a human instead of a mathematical equation. That human equation is, of course, the jury. Unless we give due regard to this fact, we shall never reach a favorable solution.

Of course, no one can tell another how to try a lawsuit. And I do not care who he is; it just cannot be done. And why is that? Because of the subjective element. We are all different. You are you, and I am me. And what might be effective for you may not be effective for me. And if I were to attempt to imitate you, if I were to try a case as you, I would lose that sincerity and that earnestness which is so important to one who is attempting to convince twelve persons whom he has met for the first time and with whom he is discussing this judicial investigation. Be yourself. And another reason why you cannot be an imposter is found in the fact that there must be flexibility in the trial lawyer. The trial lawyer must have a change of pace. He must be able to be gentle at times and, on occasions, proceed "straight from the shoulder," as it were. He must be equal to the given situation if he is to be consistently successful.

I have said no one can tell anyone else how to try a case. However, there are a few cardinal principles which govern the conduct of anyone in court. The first, and the foremost of all those principles, is to make the case simple. I do not care how complicated any case may seem to be, you will find that it turns on one or two kingpins. And make those kingpins of your case stand out from the very outset. Do not throw in a lot of "stuff"—and I use that word advisedly—which tends to confuse the jury. Do not depend upon argument to clear the smokescreen you have created. Let the important questions stand out from the very beginning of the case. In fact, if you can do it in the interrogation of the jury, do it. The earlier the jury knows the issues in the case, the better.

With reference to simplicity, may I make this suggestion? When the matter involves something requiring scientific knowledge, medical knowledge, or knowledge unusual in any degree, do not vaunt that knowledge. Many times I have listed to cross-examinations wherein the only two persons in the courtroom who knew what was being discussed were the expert witness and the cross-examiner. The jury knew nothing about it, and many times I myself felt much as the jury. Always keep your case at jury level.

Second, you must be a salesman, because you have something to sell, namely, the merit of your side of the case. And, of course, the greatest salesman in the case is your client. In fact, we tell all our clients that they have to be salesmen. Sometimes they look at you and say "Huh?" Tell them that the Fuller brush man does not have a monopoly on salesmanship. Tell them how they have to have those characteristics which people like. They have to be personable. They have to be polite. They must at all times hold their tempers, no matter what is brought out on cross-examination.

Third, the lawyer, especially he who has the burden of proof, must keep the case moving forward. After all, is he not the advocate who is asking the jury to affirmatively state that a given proposition has been proved? By keeping the case moving forward, I mean doing the thinking for the jury. If your client has the burden of proof, he has to score points. Remember that the court will tell the jury that if the evidence is evenly balanced, the verdict will be for him who has no burden. Remember that that will be the argument for opposing counsel. Thus, is it not evident that in order to forestall a tie—which means a loss for that side of the docket having the burden of proof—you must move forward and score on the opposition?

Fourth, the conduct of the trial attorney should be the epitome of sincerity and earnestness. Unless he has an obvious sincere belief in the merits of his case, he cannot convince others. Although "The Importance of Being Earnest" may be the title of a book, it may also be a rule to govern the trial lawyer at all times.

Fifth, never be personal with your adversary. No matter how unprofessional his tactics may be, no matter what the bar as a whole may think of him, no matter whether he may be personally distasteful to you, never indulge in personalities. He will have two or three friends on the jury, regardless of what he is. And once you begin to treat the matter as an issue between your adversary and yourself, you will be "hitting home," and they, who might otherwise decide the case for you on the facts, will be against you. Indeed, you might well prejudice yourself to the extent that they will be against your cause because of your personal conduct. And when such is the situation, you have not only failed in your duty as an advocate, but you have done your client a great disservice.

Always remember that your purpose in the case is to present proper evidence and to exclude improper evidence. If you have an objection, address yourself to the

court. Make a specific objection, state your reasons, and let the court rule on it. Stay out of these "asides" with opposing counsel.

Sixth—and this, I think, is very important—if you and the court disagree on some question of law, do not have that disagreement in the presence of the jury. After all, the judge is the judge. And to the twelve lay persons who are hearing the case, he is the most learned man of the law in the room. If you have a question of law upon which you and the judge happen to differ, take it up without the presence of the jury. At times it will be necessary to be firm with a court and to state your position, fortified with authorities. If the court, nevertheless, rules against, you, make your record in the proper way. But do not get into any argument with the judge in the presence of the jury, because it will be certain to hurt your cause. Stay on the good side of the judge—at least in the presence of the jury.

Many questions have been asked about juries by a few of the students. The examination of the jury is probably as important as any single phase in the case. And why do I say this? Because that is the opportunity, and the only opportunity, that the lawyer has to converse with each of the twelve jurors. It is sometimes said the judge should select the jury, and some judges do it rather well, yet it only takes ten or fifteen minutes longer if the lawyers do it properly. If the lawyer examines the juror, he has the opportunity to converse with the person. Is there any better index to a person's makeup than conversation? A person may be well dressed, apparently intelligent, but conversation will reveal him otherwise. The conversation with the prospective juror will tell you much about his makeup, his station in life, and how he would react to a given situation. Forecasting possible reactions is why we select jurors.

Much has been said and more written on how to examine a juror. It may be summed up thus: Make a good impression on the prospective jurors. How do you do that? I do not know. But I think there are a few guideposts. In the examination be very polite with the prospective juror. Never talk down to him. Thus, if he says he is a main*tain*ance man, don't say: Where do you do the *main*tenance work? Never do anything to embarrass a prospective juror in the presence of the strangers with whom this juror has to live for at least two weeks. And, if you believe or feel that you have done anything which has embarrassed a prospective juror, do not hesitate to let that juror go. Else you will be trying the case with the fear that one of those jurors is against you.

And be candid with the prospective juror. Be open with him. Bring out the unsavory in your case. If you represent someone who has a criminal record, reveal that in voir dire examination. Qualify the jurors on whether they can give such a person a fair trial. And then when you get their answers under oath, you can make much of that in your argument. Anything which is unfavorable about your case can, if revealed by you, have the "sting" taken out of it.

Nor should you be too inquisitive. Get the necessary information without prying into the lives of these persons. After all, remember, as I have stated, they are there among a host of strangers and when you ask a lot of questions which go into their personal lives, and which turn the clock back for them maybe twenty or thirty years, you might well embarrass them.

There are occasions when it becomes necessary to qualify the jurors about certain aspects of the case as a whole. Take, for example, an action under the Federal Safety Appliance Act. That statute is foreign to the jury. You cannot damage yourself by obtaining a commitment from each of them that he or she will follow the law as given to the jury by the court. Again, suppose the case involves substantial damages. It might be well to seek an agreement from each of the jurors that if the defendant is guilty, he or she not only can but will return a verdict for a substantial amount, provided a substantial verdict is justified by the law and the evidence. Whenever there is anything unusual about any feature of the case, the practice of qualifying the jury as to that particular phase should be followed.

Today we have women and men jurors. And, sometimes, it is good to try to get women. Sometimes it is good to try to get men. And why is that? Consider women—as I know all of you do. My experience has led me to believe that if a woman has anything some other woman desires, such as good looks, a handsome husband, or money, beware of women. Women's inhumanity to womankind is unequaled. Women are more severe judges of their sex than the Judge of Judges. They subject the conduct of another woman to a microscopic scrutiny. Of course, if the woman has nothing that another woman wants—making her what I believe women call a good woman—and by that I mean some poor bedeviled soul, then women are all right on the jury. Women, on the other hand, are usually very good where you represent a male—especially if he is handsome. He might be the biggest roué you have known. He might be impeached on twelve occasions during the trial. But they overlook all these things in a man. They employ the "double standard" in the courtroom too. In children's cases, women are, likewise, good. Now, men are, as a whole, pretty level. And they are especially good if you represent a woman, more so if that woman might remind them of their mother.

There are certain people whom you should avoid. Into that category I place, first of all, wealthy people. They are always afraid that the status quo will be disturbed. They are always afraid that a verdict will affect their own pocketbook or increase their taxes. And, as I say, they are inclined to leave the parties where they found them.

Bank clerks, and those employed in clerical capacities by large corporations for many years, are also to be

avoided. They are, as a rule, persons of limited horizons. You cannot try your case and at the same time change their makeup. Likewise, I like to avoid engineers and efficiency experts. These persons consider a lawsuit on a mathematical basis. Now, a lawsuit is a problem. But, as we have said, its equation is not mathematical; it is human. They do not appreciate that. They are thinking with a slide rule. They are not good, you will find.

Personally, I like to avoid young people, too. They have not had enough of the experiences of life to appreciate, in so far as a personal injury case is concerned, the full meaning of the injury, or the death, whatever it may be.

What, then, is the makeup of a good juror? Well, a good juror to my way of thinking is a person forty-five years of age or over, with some experience in the affairs of life, falling without the categories which I have just listed.

We all recognize that the only good jury is the jury which returns the verdict for the cause you represent. But, sometimes that is too late to find out; it's like an autopsy—you are dead before you learn what is wrong with you.

What about the opening statement? When should you make one? If you represent the plaintiff, you should by all means make a statement. If you represent the defendant, whether or not you make an opening statement will depend upon the circumstances of the case. In making an opening statement for the plaintiff, you should tell the jury everything you expect to prove in that statement. And do not be saying, "I hope the evidence will show" or "I think the evidence will show." Do not evince uncertainty. You need not overstate your case, but the science of semantics says that there are certain words which indicate uncertainty. Do not use any of those words, or any of those phrases. Because if you are uncertain, how can the jury be made certain? State your case. Tell the good features. Tell the weak points. State it in a chronological detailed manner so that the jury can visualize the situation. And when they hear the testimony of the witnesses and see the exhibits which are admitted into evidence, these will have some meaning for them. The purpose of the opening statement is to give the jury a preview of the case.

In the presentation of evidence try to follow the opening statement. Present the case in a chronological way. And I am glad to hear Justice Schaefer say that his court favors graphs and visual aids. Put those in evidence first. Then your first witness is the man or woman who is your best—the witness who clinches liability with serpentine force. It is the old story of first impressions being lasting ones. Sandwich in your weaker witnesses. Probably the last witness should be your second-best witness. But calling a lot of witnesses may lead you into trouble. I prefer to have the statements and give the other side the witnesses. Just put on the witnesses required to prove your case or your defense. If you have statements from the other witnesses, then you have them tied down. If they should testify without the confines of that statement, they are impeached, and the other side's cause is damaged. Above all, if you are ever uncertain about whether a witness will make a good witness, do not put him on the stand.

Cross-examination can be dangerous. Usually it results in having the witness repeat his testimony a second time. If a witness has not damaged your case, do not cross-examine him. By so doing, you can give importance to testimony actually unimportant. Do not cross-examine without a motive. The cross-examination must be conducted so that motive is never known to the witness. Accordingly, it is well to go from one subject to another so that your motive is thus concealed. Do not attempt to make a damaging admission too perfect. If you do so, your effort will probably result in the witness recovering himself.

While the witness is testifying on direct, watch him. Many lawyers are busy writing down what he says without looking at him while he is testifying. Personally, I like to watch the witness on his direct examination. You can usually tell whether he is the type of witness who will adhere to every detail of the direct examination when being cross-examined, regardless of the actual facts. Moreover, you will be in a position to know those facts about which he is uncertain. Does he hesitate? Perhaps he shows some reluctance about a matter which you can effectively cross-examine upon. You will frequently find that observation of the witness will reveal his "Achilles heel."

Cross-examination methods? Here honey draws more flies than vinegar. This business of shouting at the witness, pointing a finger in his face, does not accomplish anything. You will find that you will get more damaging admissions from any witness if you treat that witness politely and with deference. Treat him kindly. As you go along, you will find that you will get admissions from him. If you have something with which to destroy the witness, such as an impeaching statement, I think it should be used at the outset of your examination. First of all, get him down deep in mire. Get him down on record two or three times to what he testified to on direct, and then use the impeaching statement. After you use that impeaching statement, you find that you are usually the master on the rest of the examination. He will agree to almost anything you say, because he does not know what else you have. You deflate him; you demoralize him; you make him fearful. That is why I say to use the destructive force at the beginning. Of course, you do not use a statement unless it is really impeaching. If you have a statement from him and it just has one or two contradictions in it, do not use it, because a jury will know that he told outside of court substantially what he told in court.

Argument is not argument in the true sense of the term. You are not arguing with your adversary; you

are merely seeking to persuade twelve persons who must listen to you. The jury is a captive audience. You are the one who chooses the topic. You are the one who chooses the mode of presentation. You will be surprised at what a calm, orderly discussion of even the undisputed facts will do for your side. Use all the rhetorical devices; similes, metaphors, illustrations, everything to help the jury think, because argument is nothing but an audible thinking process. Once you get the jury thinking with you, then, of course, you have gained the upper hand and are their master.

May I observe that expert testimony, notwithstanding the many volumes written about it, is frequently overlooked. Many times we encounter situations with facts which have meaning only when explained by an expert. This is an effective avenue of illustrating the meaning of facts when such are not within the purview of the ordinary man. Always investigate the feature of expert testimony in your case.

May I direct your attention to the hypothetical question—properly employed this is an effective device. Indeed, it constitutes an argument while evidence is being introduced. It wraps up the entire case, so to speak, and presents for the expert an opinion which makes for better understanding by the jury.

Another word. Rebuttal evidence is, it seems to me, overlooked. Too often a witness for the defense testifies concerning a fact which has not been brought out on the plaintiff's case. The plaintiff disputes that fact and has within his power evidence to controvert it. However, he accepts that the jury understands that he denies these facts and closes his proof when the defendant does. The realization of this error is not appreciated until he hears defendant's counsel argue that thus and so was not denied by the plaintiff. The same holds for the defendant as well as the plaintiff. As far as the defendant is concerned, it becomes a matter of surebuttal.

Thank you. It has been a real pleasure to be here.