Washington Law Review

Volume 27 | Number 1

2-1-1952

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Recommended Citation
John J. Kennett, *The Preparation and Trial of a Lawsuit*, 27 Wash. L. Rev. & St. B.J. 17 (1952).
Available at: https://digitalcommons.law.uw.edu/wlr/vol27/iss1/3

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THE PREPARATION AND TRIAL OF A LAWSUIT

JOHN J. KENNETT*

IT IS AT once obvious that the subject matter encompassed by the above title is so vast that the most that can possibly be done here is to make a few suggestions that may prove helpful to the younger and more inexperienced members of the bar. It is with that thought in mind, and with a profound sense of inadequacy, that I offer the following suggestions. It likewise should be noted that many of the suggestions here made were, in the first instance, the brain children of others—I have simply adopted these brain children who were given birth by older, more erudite, and experienced lawyers.

The trial of a lawsuit has but one purpose, i. e., to elicit the facts in connection with the controversy. Therefore, the trial of a lawsuit commences when the client first enters the lawyer's private office. It is then that the client must be subjected to a rigid examination, on which the lawyer takes careful, detailed notes. A wire recorder can be used to good advantage to transcribe this first interview with the client. Before this first interview is closed, the prospective client should have been subjected to as rigorous a cross-examination as the attorney is capable of giving him. The attorney must know, before advising the client of his rights and prospects of success, whether or not the client's story is one that will stand the test of a vigorous cross-examination in the courtroom. While the client is being subjected to such an examination, he, of course, is getting the idea very clearly that there is no such thing as a "cinch" lawsuit. It is impossible for an attorney to work successfully with a client who is cocksure that he is going to win and who has many suggestions and ideas as to how his lawsuit should be tried.

It thus becomes apparent that this first interview serves many purposes. It gives the lawyer the facts. It makes the client understand the hazards and dangers that lie ahead. It enables the lawyer to judge his prospective client's trustworthiness and to judge whether or not the prospective client will be cooperative and follow advice, or whether he will be a "pest." Thus, if the lawyer decides to accept employment, the trial has already begun with the first interview.

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After having determined to accept the employment, the lawyer should take steps immediately to get detailed written statements from all witnesses, both those whose names have been given him by the client and those discovered by his own investigation. In many cases the witness will be reluctant, and will make the statement that he knows nothing about the controversy, collision, or crime, as the case may be. If the witness has made such a statement and if the lawyer is satisfied that the witness will never be cooperative to his client's cause, then the lawyer should endeavor to get him to sign a simple statement that he knows nothing about the matter. During my practice, on three different occasions, such a witness, after having signed such a statement, has been produced by the other side and has told a story very harmful to my client. In each of those three cases he left the witness stand a very deflated person after having been confronted on cross-examination with his signed statement denying any knowledge of the matter which he had discussed in glowing and detailed terms on direct examination.

After the client's story and all statements possible from witnesses have been obtained, the matter has then reached the "research" stage. It is, of course, elementary that no trial lawyer should rely upon his memory or general knowledge of the law. Quite to the contrary, he should go to court with every available decision helpful to his client, and with a full knowledge of all of the decisions that appear to be harmful to his client's cause. Such preparation requires research. The time to make this necessary research is before a complaint or answer is drafted—not just before trial. The research results in the preparation of the trial brief prior to the preparation of the first pleading. Of course, the lawyer may want to add something to the brief before he presents it to the trial court at the commencement of the actual trial, because his research is continuing and should never be regarded as finished.

This legal research must be done before the lawyer is in a position to adopt the theory or theories on which he is going to proceed. Then his complaint or answer will reflect a full knowledge of the subject matter and the applicable law. This is essential in order that the pleadings will be drawn so as to make his available evidence admissible. In drafting a complaint or an answer, the attorney should not limit himself unnecessarily, either as to the grounds of recovery or the grounds of defense. Neither should he limit himself, in the case of personal injury

actions, to the precise injuries then known to him, nor to the precise claim of damages.

Often it develops later that the client has suffered injuries wholly different from those covered by the first medical report. The human body is a complex piece of machinery made up of bone and soft tissue. The latter consists of flesh, muscles, ligaments, cartilage, nerves, arteries, veins, glands, and so forth. The tests available at this time to medical science by which they can determine the precise location, nature, or cause that results in pain, disability, or suffering to the client are very limited. It is well known that the x-ray—except in a few rare cases where a special technique is used—does not reveal injury to the soft tissue. There are a few tests available which, in some instances, assist the doctor in determining injury to soft tissue, such as the electroencephalogram, the electric myrogram, the pantopaque myelograms, the spinal puncture, and a limited number of others. With medical science in its present stage, but making new discoveries almost daily, the wisdom of not limiting oneself must be apparent. Perhaps, before the case comes to trial, a new diagnostic aid may be available and may completely change the first diagnosis.

A few other brief suggestions concerning pleadings might be helpful. In drafting the complaint, a lawyer should never anticipate defenses. Besides educating the defendant, the plaintiff may be held to have voluntarily elected to prove the nonexistence of a defense which it would have otherwise been the burden of the defendant to prove. When faced with general allegations in a pleading by the opponent, move to have them made more definite and certain. Plaintiffs' counsel too often overlook the fact that they are entitled to the same particularity in affirmative matter in the answer as the defendant is entitled to in the complaint. When representing a plaintiff in a personal injury action, and faced with a plea of contributory negligence, a lawyer should always compel his adversary to set forth with great particularity the acts of the plaintiff which it is claimed constitute contributory negligence.

Pre-trial Exploration

Under the new court rules, a vast field of exploration is possible through pre-trial discovery. These rules have given to the trial lawyer almost every conceivable tool that is needed for him to know precisely the facts with which he will be confronted when the actual trial com-

mences in the courtroom. The space allotted for this article does not permit any discussion of these new rules in detail. Rules 26 to 37, inclusive, of the Rules of Pleading, Practice and Procedure are commended for special study and consideration. It will be readily apparent that the permissible exploration is comprehensive. The deposition of "any person" may now be taken prior to trial. This includes all of the witnesses, both lay and medical, known to the attorney's adversary. The attorney may compel any person to reveal the identity and location of other persons having knowledge of relevant facts. He may compel a disclosure by any person of the existence, description, nature, custody, condition and location of any books, documents, or other tangible things. The deponent may not decline to give this information or to disclose the identity and location of witnesses known to him upon the grounds that such information will be inadmissible at trial. In addition to taking depositions, the attorney may propound written interrogatories to his adversary, either before or after he has taken his deposition and he may do this as often as desired. He may also have an inspection of documents or any other tangible thing. He may go upon lands to survey, measure or inspect same; and this he may do in regard to any object relevant to his particular case.

In a personal injury suit, if the defendant requires a medical examination of the client, the plaintiff is entitled to a copy of the report of the defendant's doctor. If he asks for and receives it, he must, if requested, make available to the defendant the reports of his own doctors. The provision for such examinations in personal injury cases extends to the matter of mental as well as physical examinations.

Under another rule, the attorney may serve upon his adversary a written request for admission as to the truth of relevant facts set forth in the request or as to the genuineness of relevant documents. If his adversary does not, within the time fixed by rule, specifically deny in a sworn statement the truth of requested admissions or set forth the reasons in detail why he cannot truthfully admit or deny the same, or serve upon him written objections to such matters on the grounds of relevancy or privilege, and bring his objections on for hearing, the request, under the rule, will be deemed admitted. This rule constitutes a trap for those lawyers who are not familiar with the rule or who, negligently or otherwise, fail to act within the time provided by the rule.

Rule 27, which deals with the perpetuation of testimony, should not

be overlooked. There are many times when an action is being prosecuted and it is apparent that a subsequent action will of necessity have to be brought to secure the fruits of victory in the first action. A typical example of such a case is a personal injury action where it is believed that the defendant is protected by liability insurance. If there is any controversy as to whether or not the defendant was covered by liability insurance at the time of the collision so as to render an insurance company liable for the payment of the judgment, it may become necessary to institute a garnishment proceeding against the insurance company after the entry of final judgment. All too often a defendant in a personal injury action may die before a final judgment in plaintiff's favor is collected. What would happen in such a contested garnishment proceeding if the defendant died after the entry of final judgment and before the trial of the garnishment proceeding? Where would plaintiff's attorney obtain the necessary testimony in court to show that in truth and fact the defendant was covered by insurance so as to render the insurance company liable for payment of the judgment? How, under such circumstances, would he ever learn the amount of the coverage? If the defendant was not the named assured in the policy, how would he prove that such defendant was an "additional assured" under the terms of the policy? It is my belief that during the pendency of the original action a plaintiff is entitled to perpetuate the testimony of the defendant in that action, and that of any other witness, as to insurance coverage for such use as may become necessary in a garnishment proceeding later. Such a perpetuation proceeding, if permitted by the court, would necessarily disclose the limits of the policy of insurance and the terms and conditions thereon. This, in and of itself, might very well greatly increase the number of settlements of pending personal injury actions without the necessity of a trial.

Demonstrative Evidence

Having made use of all of the pre-trial tools at his command, the next step for the lawyer in the orderly preparation of a trial is to determine what demonstrative evidence would be helpful in the trial of his particular case. At least two weeks before the date set for trial, he should have well in mind what will best enable him to present the case to the court or jury, as the case may be. At that time, he should order, or make arrangements to have available on the day of the trial, such articles as a map, a sketch, a medical chart or charts, possibly a

skeleton, medical records, hospital records, bank records. There are many other such aids, depending upon the nature of the case he is about to try. The records in possession of third parties, of course, should be subpoenaed or, if the originals thereof be in the possession of the adverse party and the lawyer has a copy, a notice to produce should likewise be served on the opposing attorney. All witnesses, including medical witnesses, should be subpoenaed at least two weeks before trial. This will make it possible to take depositions in time for trial, if it develops that some important witness has made plans to be absent from the county at the time of trial. The attorney should accommodate the convenience of witnesses as to time when that can be done without prejudice to his client. No witness likes to sit in the courtroom for days or hours awaiting his turn to testify. When subpoenaing a medical witness, for example, a pleasantly worded letter should be attached to the subpoena advising the doctor that if he will call on the telephone, the attorney will make every effort to conserve his time and to excuse him from attendance in the courtroom until he is actually needed. An offer of cooperation such as this very frequently makes a friendly witness out of one who would be somewhat hostile if needlessly required to cool his heels in the courtroom. Subpoenas, however, should be issued in all cases without fail.

Investigation of Jurors

Investigation of jurors prior to trial is a matter of supreme importance in any case of great moment. There is no reason why an out-of-court investigation of jurors is not permissible under the law, provided it is conducted properly. Our statutes seem to contemplate such an investigation because it is expressly provided that a list of jurors, after the venire has been drawn, shall be filed in the clerk's office, thus becoming a public record. A copy is available to anyone upon the payment of a one-dollar fee therefor. In a capital case, the defendant is entitled to this free of charge. Of course, such an investigation should not be made by the attorney who expects to try the case. It should be done for him by an honest, careful investigator. Such investigator should avoid all direct contacts with the jurors on the venire. The investigator, while conducting inquiries concerning such prospective jurors, must never reveal the reason for the investigation of the particular juror. Otherwise, a person interrogated might possibly contact the juror and the prospective juror, upon learning of the fact that he

was being investigated, might imply therefrom some threat or intimidation of some kind.

The nature of the inquiry to be made concerning any prospective jurors will depend entirely upon the nature of the case the attorney is about to try. If it be a criminal case, he, of course, will be vitally interested to know all he can concerning the juror's viewpoint about law enforcement, whether or not the juror or any close member of his family had ever had any serious difficulties with the law, whether or not the juror or any member of his immediate family had ever been the victim of a crime, or possibly whether the juror or any member of his immediate family had ever been a law enforcement officer. If the client is an Oriental, the attorney would be vitally interested in knowing the prospective juror's general outlook concerning the rights of Orientals, and so on. If it is a personal injury case, he, of course, would like to know generally the juror's views concerning personal injury cases, whether or not the juror or any member of his immediate family ever worked for an insurance company, whether he or she had ever been a claimant or a plaintiff, or a defendant in a personal injury case. If there are to be a considerable number of doctors called in the case, he should be interested in knowing the name of the juror's personal physician. These are but a few examples of what it would be helpful to know concerning a juror's viewpoint before the attorney enters the courtroom. In a small community, the lawyers generally know a large percentage of the jurors who are called on the venire. The information to be gleaned from an investigation such as here suggested only gives to the lawyers in the larger communities a picture of the jurors, somewhat like that which lawyers in a smaller community already have from their personal knowledge.

In personal injury actions, particularly in the larger counties where jurors serve for sixty days at a time, considerable information can be obtained concerning the jurors from their record as jurors. If Juror A has sat as a juror on five personal injury cases and has, on every occasion, voted for the defendant without regard to the final verdict, it is a pretty good indication that Juror A can never see any merit in a plaintiff's case. The converse may be true concerning Juror B, who has persistently voted for the plaintiff without regard to the final verdict in the case. These observations apply also to criminal cases.

The advance investigation of the jury panel as here suggested is of little value unless the lawyer knows the names of the particular jurors

assigned from the Presiding Judge's Department to the particular department wherein his case is to be tried. Therefore, he should always arrange to have an assistant in the Presiding Judge's Department to write down the names of the particular jurors as they are drawn by lot in the Presiding Judge's Department. With this information, the lawyer seated at his table in the trial department writes down the names of the twelve who are first called into the box and then makes a quick comparison of those names with the list prepared for him by his assistant in the Presiding Judge's Department. Having done this, he knows what jurors are seated in the courtroom to take the place of any of those who are excused from the jury box either on peremptory challenge or challenge for cause. With this information, the trial lawyer uses his peremptory challenges warily, because, from his out-of-court investigation, he has a pretty good picture of the way the remaining jurors in the courtroom think and believe. It should be a definite guide to enable him to judge whether or not he should use his peremptory challenges, and, if so, how many of them.

Requested Instructions

Well in advance of the trial, the lawyer should prepare his requested jury instructions. Particular care should be given to the instructions on burden of proof and proximate cause. The stock instructions on these two subjects can be improved on greatly to the advantage of the client, depending on the factual situation present. The lawyer should not overlook what may be termed as "excusatory instructions," such as those which deal with the rule of "emergency," "last clear chance," "remote cause" as contrasted to "proximate cause," "the value of the testimony of an accomplice," "the effect of intoxication" both in criminal and civil cases, etc. These are but a few of the subjects that should be given special attention by appropriate requested instructions.

It is extremely helpful and fruitful, in persuading the court to give requested instructions, if an extra copy of the requested instructions is prepared for the court, annotated with the citations showing the cases from which the principle of law was taken. Such annotations should, of course, also be placed on the lawyer's office copy. The trial court will often look up the annotations and, having looked them up, give the requested instruction when he otherwise might not have done so.

Trial Briefs

A trial brief in every case is specifically required by the court rules. That rule is honored more by being ignored than by being complied with. No one can gainsay that a properly prepared trial brief is of great assistance to the court and frequently results in the trial judge adopting that theory of the case at the outset, particularly when he has not been favored with such a brief from opposing counsel. The brief, to be of assistance, should briefly outline the factual situation to be presented, and carefully set out the principles of law that will necessarily be involved because of the factual situation. Particular attention should be given to rules of evidence as they will relate to the proffered testimony.

Preparation of Witnesses

The preparation of witnesses prior to their appearance in the courtroom is of supreme importance. The witnesses must be sold on the idea of being calm. They must be made to realize that the judge, every juror, the lawyers, and the spectators are human beings just like they are, and very much interested in the story that they are about to tell. Once the witness can be made to understand that all these people in the courtroom are possessed of the same emotions as the witness and the same fears, disappointments, hopes, ambitions, and problems as the witness, half of the battle is won insofar as the witness is concerned.

The lawyer should explain to his client that as his lawyer he has patiently built his case just as a good carpenter will build a house, but that it remains for him, the client, to do the finishing work, which requires careful attention to detail. It is up to the client to make the case airtight just as the skilled carpenter makes the house airtight by careful installation of the doors and windows. Such a homely illustration seems to be the best technique of conveying to the layman the idea of his job in the courtroom. If the client has understood the illustration, he will ask, "Well, just how do I go about completing this structure for which you have laid the foundations?" The attorney can then carefully explain how the client should conduct himself. His attitude toward opposing counsel is important. The client must understand that he is not to be flippant or to think for one moment that he can outsmart the opposing lawyer. He should be advised that most people make their worst mistakes in the courtroom when they are angry, and that lawyers frequently deliberately try to make a witness

angry for the very purpose of destroying the witness. The client must be made to understand that being courteous to the opposing lawyer will pay big dividends. He should be told of the suave, smiling, pleasant cross-examiner, whose stock-in-trade is to get a witness agreeing with him at the outset by the use of simple questions that require an affirmative answer and who later in the examination begins propounding compound questions in the same suave, pleasant manner, which cannot be answered affirmatively without damaging the witness's case. The lawyer should explain in detail to the witness just what a compound question is and point out to him the danger of quickly answering either "yes" or "no" to such a question. The witness should be advised to wait for his counsel to object when such a question is asked.

Very frequently it is necessary to speak to the client and his witnesses concerning the manner of their dress and appearance in the courtroom. This is a rather delicate subject, but when the client understands that his attorney is discussing it for the client's own financial benefit, he will usually go along with the suggestions. Clients should be warned against overdressing. A glamorous female client must be de-glamorized if she is not to arouse the jealousies of the women on the jury. A minimum of makeup with neat, clean, well-chosen, conservative clothes, set off with a careful, conservative "hairdo" will more likely win the women jurors. The men jurors will probably be favorably impressed anyway. When dealing with men clients, the attorney should take occasion to notice whether their hands and nails are clean when they are in the office. If they are not, he should advise them that they will be using their hands in the courtroom while illustrating their testimony at the map, or on the jury rail, and that dirty hands and nails might well offend jurors to the point where they will not even listen to the case. Carefully combed hair in a conservative style (no duckbills), carefully creased trousers and a well-polished pair of shoes no matter how old they may be, should be suggested. The client should be made to understand that the trial of a lawsuit is, in its last essence, the sale of a commodity to a jury—and that the commodity is the client plus the story he has to tell. First impressions are of vital importance and if the client's appearance is repulsive to the jury or obnoxious in any manner, some of the jurors will not listen to his story. Result—no sale.

The Selection of the Jurors

The selection of jurors is a matter that frequently is done in a haphazard manner. Many a lawsuit has been lost by a lawyer before

the jury has been sworn to try the case. At this point in the trial, the lawyer is the salesman. His job is to sell his personality to the jurors so that they will listen attentively to him as he makes his sales talk during the ensuing days of the trial. His *voir dire* examination of the jurors might well be likened to the introductory remarks of the canvasser who rings the doorbell and attempts to gain entrance to the prospective customer's home. The canvasser who does no more than get his foot inside the screen door seldom makes a sale—and so it is with the trial lawyer who is unsuccessful in removing the rail from between himself and the jury.

Sincere jurors are willing to be led. The same qualities that make a man a leader in the business world enable him to lead a jury. Therefore, he must immediately convey to the jury the thought that here is a man who knows where he is going and just exactly how he is going to get to his destination. In order to convey to the jurors this sense of sureness and confidence, the lawyer ought to write out in advance of trial the questions which he intends to ask of the jurors on *voir dire.* He should not ask aimless questions. He should not act as if he were asking questions simply because he was expected to. He should look the juror straight in the eye and ask his question in a firm, clear voice without taking his eyes off the juror. He should not ask a second question until he has a clear answer to his first question—but he should keep his questions coming rapidly. He should not argue with the juror, but be direct, courteous, sincere, and fair. By all means he should avoid treating the jurors as inferiors. He must make it plain to them that he is not personally interested in their past history, but that in the discharge of his duty to his client he must learn something of their past life so that he may judge whether, in his opinion, their experience in life and their philosophy of life is such as to make them the proper jurors in the particular case. Jurors admire and respect the judge on the bench. Therefore, the lawyer should at all times be respectful to the judge and avoid any controversy with the judge over any of his rulings during the *voir dire* examination.

Before he has completed his *voir dire* examination of the jury, either the lawyer or his opponent has become the potential leader of that jury. One of them has, so to speak, taken over the jury for all practical purposes. Different trial lawyers have different techniques in their attempt to become the leader that the jury is going to follow. There is the pompous lawyer who stalks into the courtroom and starts pushing

people around. There is the ingratiating lawyer with his obsequious smile and boot-licking technique, who bows and scrapes throughout the trial. There is the lawyer who enters the courtroom with a smile but who, shortly, loses his poise. Thereafter, he rants and raves. There is the lawyer who is quiet, but who is extremely dignified and who affects a great deal of learning which he does not possess. There is the lawyer who comes to the courtroom slouchily dressed and who affects an appearance of ignorance and poverty—beware of this fellow. This affectation may conceal great skill and intellect. Then there is the lawyer who has the extremely apologetic manner—sometimes he is so busy making apologies that the jury feels sorry for his client and decides for the client in spite of the lawyer. Contrast the types mentioned with the quiet, sincere, conservatively dressed lawyer who asks direct and material questions of every juror, and during this *voir dire* examination exacts a promise from every juror to be fair to his client's cause—one who has a warm, friendly smile that is sparingly used.

Opening Statements

After the jury has been selected, both counsels have another chance to sell their cases to the jury in their opening statements. Here also is an excellent opportunity for a lawyer to lose his case. He should explain to the jury in a conversational tone the purpose of an opening statement. A suggested technique is to tell them that as the evidence in the case develops, a picture will be painted, that he is now sketching the outline of that picture, that the detail and the shadows and the lighting that will go to make up the finished picture will be the evidence as it comes from the witnesses under oath on the witness stand. He should explain that experience has shown that a jury can better appreciate and evaluate evidence as it comes from the witnesses if they are advised in advance by counsel's opening statement just what the completed picture will look like. The evidence should be outlined to the jury as one would tell a story. Everyone enjoys listening to a good storyteller. The continuity of the thought or the continuity of the story should not be broken by saying, "I will prove this," and "I will prove that."

The trial attorney should not understate what he expects to prove. He is entitled to state his evidence in the light most favorable to his client. If adverse rulings by the court prevent him from proving some of the things that he has told the jury would be developed, the jury

will understand if, indeed, they remember. It must be remembered always that incompetent evidence, received without objection, is as valid in support of a verdict as though it were competent in the first instance. Opposing counsel may choose not to object to evidence which is clearly incompetent, or he may not realize that it is incompetent. In either event, it will be received for the consideration of the jury. Hence, the attorney is entitled to tell them about it in his opening statement.

Direct Examination

After the opening statements have been made, the first witness will be called to the stand. A good lawyer will have carefully analyzed the knowledge possessed by each witness that he expects to call. As to every important witness, he should have outlined his testimony either in the form of carefully prepared questions, or by notes which will enable him quickly to formulate clear, direct questions. The importance on direct examination of asking questions clearly, directly and rapidly, cannot be overemphasized. The successful lawyer has appointed himself as a leader for the jury to follow. If he was successful in his *voir dire* examination in leading the jury, and if he kept their attention while he made his opening statement, it would be folly and perhaps fatal to let them get the idea while he is examining a witness on direct examination that he has lost his bearings and knows not whither he is going. How can a jury be expected to follow a lawyer who is so totally unprepared that there is hesitation after every answer before he propounds another question? How can the jury be expected to follow as a leader an attorney who is constantly hemming and hawing?

So much for the manner in which questions should be asked. As direct examination proceeds, objections will be made. Some of them will be sustained. If the lawyer feels that the court is in error in sustaining the objection, he must not fail to state to the court, "I wish to make an offer of proof on this matter. Shall I do it now or at the next recess?" If the court prefers that the offer be made in the absence of the jury at the next recess, the attorney must be sure to make a note so that he will not forget to make that vital offer of proof. Without it, he will not get far with that point as a ground of reversal on appeal. In criminal cases, where the attorney is defending, to preserve error, he must not only object to the proffered testimony, but he must also move to strike it and that the jury be instructed to disregard it. If misconduct appears during the trial of a criminal case, he must object

to it, he must ask the court to instruct the jury to disregard it, and he must make a motion for a mistrial. If he does not do all of these things, he has no reversible error.

Attorneys often make an objection as follows: "Incompetent, irrelevant, and immaterial." This general objection, under the decisions of our Supreme Court, does not preserve any error on appeal. The purpose of an objection is to advise the court of the particular grounds of objection. The quoted phrase includes every conceivable ground, so when used it utterly fails of its purpose.

A successful trial lawyer never gets angry in the presence of the jury—either at counsel, at the witness or at the court. He has tried to set himself up as the leader in the courtroom with the jury as his followers. He has impressed them with his skill, his learning, and his absolute ability to control any situation. Under such circumstances, pure unadulterated anger may disillusion some of them. They might start looking elsewhere for a leader. On the other hand, if a situation develops where the lawyer does instinctively become righteously indignant, then by all means he should show his righteous indignation—not *at* the court but *to* the court. This will further cement in the minds of the jury his absolute sincerity in what he has been and is then presently doing.

"Side remarks" addressed to opposing counsel should be avoided. Objections should always be addressed to the court. If a lawyer never offends against this suggested rule, the court *may* come to his rescue at a critical moment when opposing counsel, by a well-directed "side remark" loud enough for the jury to hear, creates a spirit of levity in the court room when the attorney has been striving for hours or days to build up to a serious, important climax. Of course, if it is the trial judge who punctures the lawyer's balloon by a "wisecrack," there is not much he can do about it except to try to preserve such error, if any, as appears of record. But the printed record will never reflect the tension and drama of the courtroom which the lawyer has been studiously building up and which can be devastated so easily by one ill-advised "wisecrack" from the bench.

Cross-examination

Cross-examination is an art. Volumes have been written upon it. In this article there is little that can be said except to reiterate a few cardinal rules concerning it. First, one should never ask a question on

cross-examination unless he knows what the answer must be. The unexpected results of a fishing expedition with an adverse witness may destroy the case. And a witness cannot be impeached on a collateral matter; he who asks the question is bound by the answer of the witness. Also, one should never insinuate that a witness is lying—unless he is prepared to prove it, and it concerns a material issue. Remember, even if the testimony can be proved to be false, such proof will not be permitted if it involves a collateral matter.

Courtesy on the part of the cross-examiner pays dividends. However, it is quite permissible for the cross-examiner to become more aggressive, even to a point just short of being antagonistic when he can prove that the witness has falsified on a material issue. But extreme courtesy is always the rule in cross-examining women, the aged, and youth. Perjury by anyone falling in the three classes last mentioned must be disclosed and proved in a courteous way.

Textbooks are a potent aid in cross-examination, if the questioner knows how to use them. When dealing with an expert witness, on cross-examination, one is entitled to develop whether the opinions expressed by such witness on direct examination are merely his own opinions or whether they are supported by authorities on the particular subject. One may inquire of the witness whether the works of a particular author are generally recognized by his profession as authoritative on the particular subject. If the witness acknowledges that the works of that particular author are recognized by the witness's profession as authoritative, the questioner may then pull from his brief case a textbook by that author and ask the witness if he agrees or disagrees with the following statement written by that authority. Thus he gets before the jury the opinion of a person recognized by the witness's profession as authoritative but who is not available as a witness. If the witness blandly states that the person referred to in the question is not recognized by the witness's profession as an authority, then the examiner is stymied on openly using the textbook and reading therefrom in his cross-examination.

Closing Arguments

The successful trial attorney never considers his case won until the verdict has been returned and filed. He may feel that the jury is with him, but experience has demonstrated the risk of any lawyer taking any case for granted. Every closing argument should be made as

though the case depended on it, for it probably does. The attorney should carefully make an outline of the evidence in the case and note thereon, at appropriate places, the numbers of the particular instructions of the court which bear upon the evidence that he is about to discuss. This will avoid losing precious time during the argument by having to thumb through a great number of instructions to find the one applicable to the particular bit of evidence he is discussing. An attorney who has carefully outlined his argument and made appropriate annotations to the pertinent instructions approaches the jury box with a feeling of confidence.

There is one phrase commonly used by trial judges in their closing instruction which throws a barrier in front of the plaintiff's lawyer. He must spend several minutes removing that barrier before he can make any appreciable headway with the jury. That phrase is, "You will now listen to the argument of counsel." Sit in the courtroom some time as a spectator and observe the jurors' reaction when this concluding statement is made to them. Invariably the jurors straighten up, stiffen themselves in their chairs as if to say, "So, you are about to argue with me, are you? You are going to try to sell me a bill of goods!" This instinctive reaction of the jury can be avoided if, by his requested instructions, the lawyer can persuade the judge to close his instructions with some such statement as, "It will now be your pleasure to hear respective counsel discuss and sum up the evidence in light of the instructions I have given. You should be interested in what they have to say. The purpose of their remarks is to aid you in arriving at your verdict."

If the judge has thrown this usual barrier in front of the plaintiff's attorney, however, the jury rail which he has been striving throughout the trial to eradicate stands between him and the jury once more. It is necessary to patiently go about the task of removing it again. One effective way to do so is to talk to the jury for a few minutes about something somewhat foreign to the case. The jury might well be told of their own importance, that they are clothed with a judicial robe while sitting as the triers of the fact. They might well be reminded that the right to trial by jury was bought by the blood of their ancestors and is a sacred birthright of all democratic people. The contrast with the dictatorships where no such right exists will bring home forcefully to the jury the importance of the role they are filling. Such discussion, on a subject where all agree so basically and strongly, will tend to remove

any barrier between attorney and jurors. When the individual jurors have started to relax and have become attentive and when they follow the lawyer's movements with their eyes, then, and not until then, is it time to begin to discuss the specific issues in the case. The lawyer, having sensed that he has again won the interest and attention of the jury, should proceed with a purely logical argument. He should ask the jurors to reason with him. He, of course, should anticipate and answer directly anything that might appear to the jurors to be a flaw in his argument.

There are usually some weak spots in every case and the careful lawyer should figure out in advance how to bridge such weak spots, by a logical analysis of the court's instructions and the inferences arising from the circumstances as well as from the direct evidence. A lawyer should never wait for the opposing attorney to develop the weak spots. The good trial attorney exposes in his own argument any weak spots in his own case and explains them away.

It is poor technique for a lawyer to dare the jury to decide against his client. In all probability the jury may accept the dare. Neither should an attorney, under any circumstances, ever misquote or distort the evidence. Apart from the question of ethics, such distortion will work like a boomerang. To do so is to challenge the memory and intellect of the jurors. There are sure to be some jurors on the case that have both a good memory and a good intellect. The lawyer who has misquoted or distorted the evidence will have those jurors pointing out in the jury room the attorney's lack of fairness, his deceit, and untrustworthiness. This resulting mistrust in the minds of the jurors may well carry over to other matters in the case.

If there are some particularly strong points which appear to be unanswerable, the lawyer should expressly demand, in the form of a challenge to the opposing lawyer, that he discuss and answer his argument with respect to those particular points. This type of argument when properly used is devastating. At the close of the argument, counsel should thank the jury for their attention, should appeal to their sense of fairness and justice. He should ask their forgiveness of any conduct on his part that may have offended them and ask that they likewise extend such consideration and forgiveness to his opposing counsel. Having done this, he should retire to counsels' table with a serene and confident bearing.

PRESERVING ERROR FOR APPEAL

Mention has heretofore been made concerning the necessity of making proper "offers of proof," "motions to strike," "requests that the jury be instructed to disregard," and "motions for mistrial." Every case should be tried with the thought in mind that a record sufficient to present any claimed error on appeal will be available to whatever attorney conducts the appeal. A client may choose to change attorneys after the case has been lost in the trial court. If the losing attorney has completely failed to make a record that will adequately present claimed errors to the Supreme Court, he has at the very least been of disservice to the client and of no credit to the profession. It is even very possible that such attorney will be charged with negligence either before the Bar Association or in a civil suit for damages.

All too frequently a witness's use of the words "here," "there," "this," "that," etc. are wholly unintelligible for purposes of review by the Supreme Court because it is impossible for that Court to know from the printed record what the witness meant or referred to. Those persons present at the trial of the cause, who saw the witness's gestures as he used words such as above mentioned, knew what the witness meant. Unfortunately, the witness's gestures do not become a part of the stenographic transcript unless the attorney interrupts and dictates to the court reporter the particular gesture made by the witness at the time. Every attorney owes it to his client to translate the witness's gestures into the spoken word so as to preserve any claim of error.

In jury cases, probably the most frequent grounds of reversal by the Supreme Court are incorrect statements of law in the trial court's instructions, and the failure of the trial court to give instructions requested by the losing party which properly stated the law and to which the losing party was entitled. However, many times the attorney fails to take proper or adequate exceptions to the court's instructions or to the court's failure to instruct. Rule 10 of Pleading, Practice and Procedure requires that exceptions to instructions or the refusal to give requested instructions must be "sufficiently specific to apprise the judge of the points of law or questions of fact in dispute." Unless adequate and proper exceptions are taken, the Supreme Court will not reverse the judgment for any errors concerning instructions.

Motions for new trial or for judgment notwithstanding the verdict must be served and filed within two days after the verdict is returned. If affidavits are to be used in support of one or more of the grounds

upon which the motion for new trial is based, such affidavits must be filed within two days after the motion for new trial is filed, unless the court, upon application of the moving party, enters an order extending the time within which such affidavits can be filed. Rem Rev. Stat. § 402. In most law actions, a motion for new trial is not a necessary prerequisite to an appeal. However, if a patent error has occurred in the trial court and the losing attorney fails to make a motion for a new trial and, thereafter, a successful appeal is taken by the losing party, it would seem that the client might well recover in a suit against his former attorney for the expenses incurred on appeal, which could have been obviated by properly presenting and arguing a motion for new trial before the trial judge.

It must now be abundantly obvious to any reader of this article that any one of the subjects here touched upon could well be the basis of a complete article. No attempt has here been made to completely cover all the ramifications of the preparation and trial of a lawsuit. The attempt here has been to present an outline which suggests the matters that merit attention and detailed thought in a lawsuit. It is hoped that these suggestions will prove helpful and will stimulate further thought, particularly among the younger members of the bar.