Denver Law Review

Volume 26 | Issue 4 Article 7

June 2021

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artesian water, which has found a natural opening through which to escape to the surface. I can see no real difference between water which thus escapes naturally and water which escapes through an artesian well which is no more than an artificial opening instead of a natural one.

"These artesian wells are used primarily, if not entirely, for domestic culinary purposes. And this water is just as essential, if not more so, than water used for irrigation. The Constitution gives priority to water for domestic purposes over that for irrigation thus recognizing its superior importance. Since the doctrine of priority of appropriation has been held applicable to surface streams regardless of constitutional or statutoy provisions, there seems to be no reason why this doctrine should not also be applicable to artesian water.

"As was said in *McClellan v. Hurdle*, 3 C. A. 430, 434: 'It makes no difference whether water reaches a certain point by percolation, subterranean channel or surface channel, it is subject to appropriation.' "

And the court concluded by quoting from a Utah case, *Wrathall v. Johnson*, 86 Utah 50, 40 P. (2d) 755, which also applied the appropriation doctrine to artesian waters.

Give The Reporter A Break

By H. N. WOODMAN

Editor's Note: Friendly "Woody" Woodman, reporter in Judge Knauss' Division of the District Court, is well-known to most Denver lawyers. Recently Mr. Woodman was invited to speak his mind before a meeting of the Law Club. His remarks on that occasion are reprinted below.

Mr. President and Gentlemen: For many years I have been recording the remarks of members of the legal profession in the court room, and now for me to appear before you in the role of speaker is a unique experience indeed. However, in this inverse procedure, I may be able to offer a few sidelights on our mutual relationships.

You have been taught the fundamentals, the higher and broader outlook in the practice of law; some of you are teaching it; yet through many years of court room proceedings, I might comment and offer suggestions on some of the lesser things in our daily court room life.

My suggestions will deal mainly with jury cases. The judges, you know, hear so many cases that they become experts in judging human nature and the integrity of witnesses; and in the ordinary court case, through active participation, they can promptly separate the wheat from the chaff and arrive at a speedy, correct decision.

Jury cases, however, are more formal. The procedure of the selection of the jury and the parade of witnesses before juries, interspersed with the maneuvers of counsel, is interesting and enlightening.

Witnesses Are People

The witnesses are varied, peculiar and individualistic, backward, stubborn, verbose, entertaining. We have the witness that volunteers, and speaking of the volunteering witness reminds me of the four-year-old on the bus one evening. This little girl stopped opposite my seat and looked at me. I said, "Hello, what's your name?" She said, "My name is Gladys Evelyn McKenzie. I live at 2965 South Ogden Street. And my telephone number is SPruce 2916."

We have the illiterate witness, like the defendant in a Casper murder case. On direct examination he said, "I didn't have no gun." And on cross-examination by the prosecutor: "Q. You say on this occasion you had no gun? A. No, I said I didn't have no gun."

Then we have the smart-alecky witness—the one who, while making a good witness on direct, becomes hostile on cross and really prejudices the jury against his side of the case somewhat in the following manner: "Q. I don't quite understand that. Will you explain it a little more in detail? A. Well, I'll see if I can make you understand it. It was this way (explaining), ending, 'Now, have you got it through your head?' " On cross-examination counsel will seize an opportunity to draw more statements like this from him for the effect on the jury.

We have the likeable, entertaining witness, earnest and anxious to help. We had such a witness a short time ago, one who noted the dignified remarks of counsel and wanted to be in line. Thus he addressed the Court with the respectful terms, "If the Court please," and "Your Honor," and addressed counsel as "Counselor."

We have the witness that opposing counsel is glad to see leave the stand. I note with this kind of witness he often says, "No cross-examination," or he will examine on one or two points only, rather than risk emphasizing the positive direct testimony. Opposing counsel will keep some witnesses on the stand for extended cross-examination because he knows their attitude will help his case. Counsel will sometimes adopt the slipshod manner of the witness to bring out a point in his favor.

The manner and demeanor of witnesses have weight with the jury; in fact, plaintiffs and defendants often win or lose cases by their demeanor on the stand.

With this great variety, objectivity of counsel must extend to the witness. The ordinary witness in a lawsuit cannot be expected to possess the same degree of poise, intelligence and orientation as Court and counsel. Difficulties encountered with witnesses resulting from the latter's nervousness, desire to tell the whole story in one breath, language peculiarities and defects, make it necessary for counsel to adjust trial methods and tactics to the exigencies of the occasion; incidentally, bearing in mind that failure to do this places a greater burden upon the reporter.

Counsel on Review

I come now to counsel. And please let me pay tribute to the fairness, accomplishments and good sportsmanship of the legal profession. Day after day we have cases before the Court and jury into which counsel enter *fully prepared,* present their cases efficiently and properly, with no antagonistic feeling on either side, and secure a fair decision. Also, our jurors under the present system, are high-class citizens in whom you can place your cases with confidence. They are intelligent, weigh the cases with good judgment, and usually arrive at surprisingly good results.

However, unusual incidents do take place and it is amusing to me to see the reaction of an attorney when he really gets hit in the solar plexus by the remark of a witness. And they do get hit once in a while, when least expecting it. Like the couple getting married by the Justice of the Peace. When the Justice declared them to be husband and wife, instead of the usual kiss, he hauled off and socked her. She, of course, was surprised and hurt, and wailed, "John, why did you hit me? I haven't done anything." He said, "I know. You haven't done anything. Now see what will happen to you if you start something."

Attorneys are ever mindful of the effect of their court-room methods upon juries. Many fail to appreciate, however, that indistinct speech, poor selection of words, false starts, a monotonous or an uncultivated delivery, create an unfavorable impression upon those whom it is sought to influence.

Nothing more quickly arrests the attention or captures the interest of judge and jury than a straightforward examination or argument expressed in clear, simple and classic English.

The succinct statement of objections on the record makes it possible for the Court to rule promptly. Judges prefer this practice. Counsel will often argue the merits of an offer or a question without actually objecting.

The manner of argument often sways the jury, sometimes adversely. I have in mind two instances of attorneys in closing arguments accusing witnesses of lying, illustrating widely different methods of approach. Both were accompanied by unusual items of physical gesture: in the first, sweeping a glass of water off the attorney's stand; in the second, the breaking of a glass table top. The first went something like this (berating the police department): "Why, ladies and gentlemen, look at that flat-nosed detective over there. Do you suppose he could tell the truth? No. And take this captain of detectives. He lied to you, trying to uphold the department," and so on. The second instance: "The witness I know did not mean what he said. I don't think he really intended to make that statement, in the light of the real facts. Why, ladies and gentlemen, it is astounding (pounding table and breaking glass top)—oh, oh, I owe the County forty bucks—it is astounding that the witness would make a statement like that."

Well, in the first instance, the jury resented counsel's offensive remarks

and were amused at his discomfiture in knocking off the glass of water. In the second instance, the jury felt sorry for the man who broke the glass top. Verdicts were returned accordingly. I know my last remarks are classified as conclusions, but a reporter, through long experience, senses such conclusions.

And For the Record

May I now say something about the record, with which I deal in the court room. You realize that the shorthand reporter is under a nervous and mental strain at all times. He cannot relax, because just about the time he thinks things are going along nicely, bang, everything breaks loose—a simple question, an attorney on his feet making an objection, the examining attorney trying to substantiate his question, the witness hastening to answer it for fear he might be shut off, all at the same time. Of course, an experienced reporter has dealt with these situations many times, but still the tendency is to "hit the ceiling"—and switch to Calvert.

A reporter's exasperation is sometimes amusing to others. An informal hearing was being held by a referee in the court room of the old Walsenburg court house. The wind was blowing, causing the loose window panes to rattle and the awnings to thump. This was rather nerve-racking to the reporter, who was trying hear a low-talking witness. The town's old-timers drifted in to see what was going on. They pushed open the old, creaking, full-length batwing doors, greeted one another, "Hello, Bill," "Hello, Jake; how's everything below." All this increased the difficulties of the reporter, particularly with the key words, and caused him to boil inwardly. The climax came with one old-timer shuffled forward to the vacant jury box to get a better view. He walked up the steps to a top seat and in sitting down kicked over a metal cuspidor, which went merrily bumpity-bump down the steps to the floor. The reporter was unable to restrain himself. He jumped up, grabbed his chair, pounded it on the floor, and cried out, "For Krisesake, if we're going to have noise, let's have some."

On another occasion, in a similar hearing before a referee, the witness chair was placed close to the shaky reporter's table. The witness crossed his legs and with his free foot nervously began to kick the table, causing the reporter's pen to jump and record unreadable outlines. The reporter politely requested the witness to cease kicking the table, but after a lull he continued. The reporter warned the witness a second time, but again the foot-thump, thump, thump, and the pen-jump, jump, jump. This time the exasperated reporter reached over and jabbed his pen into the witness' leg!

I can best illustrate the mental and nervous strain of taking steady cross-examination by the example of anyone writing longhand for an hour or so at top speed. By the end of that time he is ready to recess, just as is the reporter. Of course, the reporter is trained to carry on with as much ease and temperament as possible, but at times the going get pretty tough. And if the reporter in reading some of the proceedings hesitates, you may

remember that even in fast longhand writing you, yourself, in hurried translation, have hesitated over a word or phrase that was perfectly legible in calmer moments. But, again, I have been impressed by the kindness and courtesy of the legal profession. I think all lawyers realize the difficulties faced by the reporter in his daily work.

Making a Record

In connection with the record may I offer a few suggestions. The curricula of our law schools rarely emphasize the factors which go to the proper making of the record. In many parts of the country bar associations conduct lectures for the benefit of attorneys, but these lectures cover almost every subject except that of making the record. Yet the personality of the participants is reflected in the record before the Supreme Court on appeal.

I am informed, however, that there is an exception to this in Denver; that in the two Denver law schools some time is devoted to the making of the record in criminal procedure and that it is contemplated in civil procedure. Max Melville, who teaches in both schools, tells me that he is taking his class through every step in a criminal case from the time of the filing of the information until the case is presented to the Court and the jury, and also through to the Supreme Court. He finds that the student thereby more intelligently grasps this procedure in the reading of cases. This is timely and valuable instruction.

I know that you here today are familiar with this subject and are not guilty intentionally of any of the following unless it is because the heat of trial and your concentration on the case. I make these suggestions simply in the nature of review.

In presenting an exhibit, please pause while the reporter marks it. A short time ago we had the incident where counsel said, "Now, while the reporter is marking the exhibit, let me ask you this:" In other words, the reporter cannot simultaneously mark exhibits and record testimony; he should be given sufficient time to mark and index the exhibit before the next question is asked. If numerous exhibits are to be marked, it is extremely helpful to the reporter and to the participants in the trial that they be marked in advance to avoid unnecessary delay in the proceedings.

When the character of the exhibit is such that it is intended to be withdrawn, the attorney should state his intention so to do at the time of presenting the exhibit and ask leave to make the substitution.

In making offer of an exhibit counsel should identify it briefly: that is, "I offer in evidence Exhibit 16, a letter dated February 10, 1948, from A. B. Jones to R. H. Smith." It often happens that two or more letters may bear the same date. Reference in succeeding questions to "this letter" or "that paper," without adequate identification, makes the record meaningless.

"About That Long"

Further, in connection with the answers of witnesses (and this happens so many, many times), such expressions as "over to about here," "about that long," "he had a bruise right here as big as that, and another over there, but not quite so large," and indications on a map or chart, become entirely meaningless when read in the typed record. The reporter is not permitted to draw a conclusion from a witness' gestures. The record must be clarified by Court or counsel, by interposing questions stating the portion of the body indicated, the length of the illustration, or by having the witness place upon the map or chart letters or numbers embracing the points indicated. In other words, the record should read something like this:

Q. About how long was it?
A. It was about that long.
Q. About six inches?
A. Yes. And he had a bruise right here as big as that.
Q. You mean a bruise on his right arm just above the elbow; is that right?
A. Yes.
Q. And about two inches long?
A. Yes.

And as to the map or chart:

A. My car was about here when I saw him first.
Q. Will you place the letter "A" there where you were when you first saw him?
A. Yes.
Q. Where was his car when you first saw it?
A. About here.
Q. Will you place the letter "B" there?
A. Yes.
Q. Where was the point of impact?
A. It was about in here—no, about here.
Q. Will you place the figure "1" there?
A. Yes. But my car landed in a heap on the curbing here after he hit me.
Q. Will you place the letter "C" where your car stopped?
A. Yes.
Q. Where was his car after the collision?
A. It was about here.
Q. Will you place the letter "D" there?
A. Yes.
Q. Now, for the benefit of the jury, how far is it from where you first saw him until the impact; in other words, from point "A" to point "1"?

The chances are that if you do not make the record as it should be made,

the Court will take a hand, and the jury sometimes wonder if the counsel cannot make his own record.

The reporter would appreciate the spelling of an unusual name. When Mr. White is mentioned, the reporter naturally assumes it is W-h-i-t-e, whereas it might be Weit, Whyte, Wite, or even Wyatt. A name such as Przybylowicz certainly requires spelling.

Keys to the Reporter's Kingdom

I mentioned key words. Let me illustrate: In an epidemic of colds, with its attendant coughing and sneezing, the reporter, having interrupted frequently and being inclined to keep quiet and do his best, really becomes discouraged when he runs into something like this: "A. I was going down (cough) street, proceeding about (sneeze) miles an hour, when I was hit by a truck belonging to the (cough) company."

When the questioner, familiar with the facts, asks: "What happened after, as you say, you were travelling down *Tenth Street* at about *twenty* miles an hour and were hit by the *Weicker* truck?" he really has to dodge to escape being embraced by the reporter.

Of late years, in civil procedure, we have done away with the practice of filing a bill of exceptions on appeal and are now presenting what is called a reporter's transcript. Not long ago counsel were always careful to note exceptions to the Court's rulings, but now that is not necessary.

One of the most annoying practices of some lawyers is what reporters call "echoing," that is, repeating the answers of witnesses while mentally attempting to frame the succeeding questions.

Since the reporter is called upon to render a verbatim transcript of witnesses' testimony, the response of the witness to the repeated question must be recorded, thus creating an unnecessary duplication distracting to the reporter, time-wasting to the judge or reviewing body, and expensive to litigants.

Impatient counsel are often guilty of interrupting remarks of the Court, opposing counsel, or the witness. Often this approaches discourtesy. It places a terrific burden upon the reporter. First, because of the attempted or effective drowning out of the first speaker's last words. Second, because the reporter, if he hears the end of the first statement and the beginning of the interruption, is compelled to carry both in mind while writing at terrific speed to "catch up."

This being the case when only two persons refuse to let each other finish, what can be said or done when three or four arise simultaneously to give vocal vent to their outraged feelings. The transcript, in such case, may be replete with broken statements.

And the Reporter's Crosses

The accents of foreign witnesses, the use of colloquialisms, the swallowing of words, the incorrect choice of language, the elision of material words, and generally the use of unclear, inaudible speech, all necessitate a distinct and independent mental operation on the part of the reporter in transcribing the sound heard into words conveying some degree of intelligibility. The inaudible witness drives the reporter to distraction, often affecting his ability to absorb intelligently the following question when he is still trying to decipher the witness' last remarks, although some of it may be as meaningless as the colloquy between the restaurant customer and the waitress. He said, "Sister, gimme a cuppa coffee *without cream.*" She replied, "Mister, you'll have to take it *without milk*. We ain't got no cream."

In general, nothing is more upsetting to the reporter's mental equilibrium than the inability to hear distinctly each word uttered, necessitating guessing at intervening words and wondering whether the guess is correct while the flood of speech goes on and on. This takes place frequently when counsel turns his back to the reporter to address a remark to opposing counsel. Oftentimes the reporter hears "That is conceded," or "I will agree to that," without having heard anything more than the sound of a whispered conversation, which he assumes has been the subject-matter of the concession desired. Counsel undoubtedly expect the reporter to note the concession, but what it relates to is bound to remain a mystery, unless counsel make certain to state the concession or stipulation on the record.

The accelerated tempo of modern life is in some measure responsible for the confusion in this respect. Older members of the bar will recall the meticulous care with which papers were drawn; the scrupulous deference to Court, opposing counsel and witnesses at the trial; the deliberateness and scholarliness of utterance which characterized the barrister of former years.

Congestion in the courts, pressure of economic necessity, and the nervous haste of modern-day life have apparently changed all this. Higher academic requirements for admission to the bar have not resulted in greater culture, nor in improved ability to express thoughts through the medium of language. Chopped enunciation, ragged sentences, slurred words, poor grammatical construction, are so commonplace today that the clear and precise wielder of the English tongue is the marked exception that arouses wonderment and attention.

Bearing in mind the importance of the finished record to Court, counsel and parties-litigant, it would seem self-evident that those concerned in using the record should exercise the greatest degree of care in its making. The nation-wide experience of reporters over many years leads to the inescapable conclusion, however, that exactly the opposite is too often the case.

Now, I hope I haven't been too critical of the participants in the record, but you will remember, at the beginning of this topic, I mentioned that you

here were not guilty of any of these faulty practices. I mention them simply so that you may know what the reporter is faced with.

Finally, let me illustrate what the reporter appreciates. For example, the spelling of a name. Of course, on a witness taking the stand, the Court or counsel ordinarily will ask for the spelling of an unusual name, but occasionally this is overlooked. When Joe Prelocktowitz took the stand recently and gave his name, the reporter asked him to spell it, and the witness replied, "Aw, just call me Joe—J-o-e." So all I ask you to do is to call me Woody—W-o-o-d-y—so that I in turn may whisper to you, "Buddy—B-u-d-d-y—give the reporter a break."

New Members of the Denver Bar Association

At the regular monthly luncheon meeting on March 7, the following attorneys were elected to membership in the Denver Bar Association:

Nathan L. Baum
Harry W. Bowles
Theodore D. Brown
Robert S. Davies
Alfred L. Deaton
William D. Embree, Jr.
Herman H. Feldman
Billie Hallen
C. Edward Hoelzer
Irena S. Ingham
Edgar A. Stansfield
L. Berwyn Ullstrom
Patrick M. Westfeldt