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A PRAGMATIC APPROACH TO COMPLEX LITIGATION*

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I. INTRODUCTION

There are many definitions of what is casually called in commercial law the "big case." Those definitions tend to describe the more memorable features of such a case rather than its inherent nature. Thus a case is said to be a "big case" when it involves many issues, many defendants, hundreds of exhibits, thousands of pages of testimony, months of hearings, and millions of dollars.

It has also been said by judicial commentators that one may recognize the "big case" because it creates an acute crisis in the current administration of justice. This crisis is the result of three principal vices associated with complex litigation: (1) unnecessary consumption of time and energy, (2) delay in disposition of disputes, and (3) enormous and wasteful expenditures of money.

For the practitioner, there is perhaps a rather more simple test for recognition of the big case. If a judge to whom that case has been assigned begins to show unmistakable signs of hostility towards counsel, although he had previously been uniformly courteous and pleasant, it may be because a truly complex case has been brought into his life. He will have noticed that the conditions surrounding this case have created confusion, magnified uncertainties, multiplied the possibilities or error, and otherwise tended to make less certain the court's own rulings. This situation is obviously aggravated by the presence of a jury but the foregoing symptoms will also exist in instances where such cases are tried to the court.

II. INITIATING THE LITIGATION: PRELIMINARY CONSIDERATIONS

Let us assume that the client has told counsel his story, counsel has checked out the relevant facts and is thinking of drafting a complaint. Ordinarily he would draft a complaint which is short and concise. He should not depart from that practice in complex litigation. The purpose of a complaint is to open the door of the court, no more. It should withstand, of course, a motion to dismiss. But a

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lengthy, prolix, complicated complaint will produce a set of interrogatories, a document request, and a series of questions at deposition, with no previous parallel in the experience of the novice attorney, and will consequently waste counsel's time unnecessarily.

One must remember that parties in complex cases tend to be among the most affluent of adversaries. They tend to hire tough, able, determined lawyers who receive very handsome hourly rates regardless of the outcome of the litigation. Typically, they hire large firms frequently populated by young associates who write interrogatories and document demands as a way of life—sometimes for years.

I know of one small firm that was so tied up by a set of interrogatories in a major case that it took them a year to answer and thus precluded them from accomplishing anything else in the case. Of course, they made a rather basic mistake; they unnecessarily named seventy-six plaintiffs in their complaint, each of which had different problems. Consequently, they answered interrogatories and document demands with respect to all seventy-six. As a general rule, therefore, it is unwise to add a plaintiff to the complaint unless he is really needed or unless counsel expects to generate damages for him.

Counsel should be especially cautious about bringing a class action. One may graphically describe the class action as the plugging in of the socket to Frankenstein's ear. Some basic observations suggested that: counsel often loses control, certifying the case takes forever, it is terribly expensive to send out the required notices, and there will be a big hassle about counsel's fee. There is one exception to the basic rule of avoidance of class actions. Where the damages are small, the class readily identifiable, and counsel believes in the case with what amounts to religious fervor, then and only then should he bring the class action.

In pleading the violation plaintiff's counsel is going to have to add a damage claim. Some lawyers take the view that damages may be added at a later time. This procedure is very unimpressive to experienced defense counsel. A plaintiff should try to understand the nature of his damages before the case is filed if for no other reason than this: one may have a situation such as an antitrust violation which has not actually affected one's client.

What are the tools in calculating damages? Usually, when the damage is done, it is done to a business. That business may be no longer in existence, or it may no longer be a viable business. If the business is not in existence, then counsel needs to know what was the value of that business when it was in existence. To determine this, one analyzes comparable businesses and tries to determine

what earning formula would be used by those who acquire such businesses. If the business is in existence but not viable, it has lost sales. Lost sales have to be translated into lost profits and in doing so counsel must calculate expenses. One should make this calculation with a high degree of precision, because the alternative is a very long and embarrassing cross-examination of one's expert on the subject of damages. Damages are an area where the uninitiated are most likely to fail. Most lawyers can figure out a violation, but it takes an extremely able lawyer, first time up, to figure out his damages.

It is extremely important for counsel to employ what is hopefully a competent and imaginative accountant. Unless counsel is an accountant himself, he will miss damages. Sometimes the client's accountant is the person who can fill this need for accounting expertise. More often, he is not. In addition, I personally find that the larger the accounting firm, the less able they are to provide help.

III. Communicating to the Trier of Fact

(A) *The Jury Trial*

Perhaps the greatest challenge to a lawyer's imagination is the task of communicating effectively to a jury of laymen the critical facts in a major complex case such as an antitrust or securities matter. Usually, the jury will be expected to grasp the nature of the business involved, its trade, terms, the economic structure of the market, and the variable factors influencing price and distribution practices. Frequently, in such a case, the ultimate question the jury must decide is why a company has failed or succeeded in the competitive struggle—an issue that will consistently puzzle the most intelligent academic minds already fully grounded in the relevant theory and profoundly familiar with the facts of the particular case.

The trial lawyer is presented therefore with an audience, the jury, composed perhaps in large part of middle-aged housewives who have not read anything more difficult since they graduated from high school than the local newspapers. Their closest contacts with the laws of economics are their struggles over household budgets. At trial, these jurors are not permitted to take notes or to ask questions when they are confused by the evidence. They are not permitted to relieve their ignorance with the light of a textbook (which they sometimes do surreptitiously). Moreover, they are instructed not to discuss the case among themselves during the trial and therefore may not approach the brightest among their members for intellectual assistance. They are forbidden to discuss the matter

with their families or with those who are perhaps better educated on the subject.

At the end of protracted exposure to this state of confusion, the jurors are asked to take what is, in effect, a "final examination" guided by conflicting rules, or instructions, delivered to them by a judge, but usually drafted by counsel who are seeking some subtle advantage. Under the circumstances, it is amazing how well they perform.

Of course, in cases tried without a jury, the court is permitted and indeed encouraged to take notes, and to ask questions of a witness or an attorney when he does not understand what is going on. He is carefully spoon-fed with trial briefs, proposed findings of fact, and conclusions of law. Indeed, in cases tried to the court, counsel will interrupt the most critical cross-examination to answer questions from the bench. These questions appear at the time to be, at worst, simple-minded, and at best, inevitably calculated to tip the witness to the least dangerous answer; yet, counsel is grateful that the court wishes to keep up with him at all.

Our judges are, of course, by popular consent, the brightest among our profession. Yet as any lawyer who has tried a complex case will readily admit, the court may have great difficulty following the various theories of the case if he has not had the experience of trying such a case as a practitioner. It is ironic, therefore, that in the name of protecting the impartiality of the jury we impose upon them the Herculian task of deciding cases without asking questions of the witness, without interrogating counsel about the meaning of a document or chart, and without anything but the most rudimentary understanding of the rules of the game being played before them. The point to be derived from this is not that the uninitiated laywer should never try a complex case because the situation is inherently impossible, but rather that if he does try a case there are certain fundamentals of communication which should be observed.

In complex commercial litigation, as in any other litigation, it is the task of counsel to provide the jury with memory aids. The professional experts on the subject of memory are psychologists. Here I wish to digress for a personal note. In 1957, I worked part-time for a group of psychologists associated with George Washington University. Their mission was to devise a way to teach the average army recruit how to operate and do basic field repair of complex radar equipment in as short a time as possible without the benefit of a course in electronics. The army had discovered, to its dismay, that the recruit's time of service would expire by the time they had

learned the rudimentary electronics necessary to perform the task at hand.

The psychologists solved the problem. Instead of teaching electronics, they told these students a series of stories about how the equipment operated and could be repaired. These stories were simple to understand, logical and plausible in their content and each step in the story was causally connected to the preceeding step. One feature differentiated them from the traditional army training—the stories were entirely fictitious and had nothing whatsoever to do with the actual function of the equipment. By this means the psychologists were able to train a test group to perform as well as the conventionally trained group in less than one-third of the time.

The lesson is apparent. It is not that one should communicate fictitious stories to a jury, rather it is that the average juror can remember a story with a beginning, a middle and an end much more readily than a series of facts, an argument, or diatribe.

Somewhere in the dry dusty stuff of the ordinary commercial case there lies a story waiting to be discovered and told by an able trial lawyer and somewhere in that story there lies a central conflict, a dilemma that must be resolved. It is the task of the trial lawyer to find the story that explains the causal and inevitable relationships between the various events that occurred. The jurors, like the army recruits, are not as interested in what happened or when it happened, or how it happened, as they are in *why* it happened. It should also be remembered that in commercial cases one motivation tends to dominate throughout: Will the acts of the characters on the particular stage make money for them? Are they the architects of their own demise or are they the victims of some ruthless business plot? There is perhaps one simple rule for motivation: If you don't understand why things happened the way they did, watch where the money goes.

It has often been said that understatement rather than overstatement of facts must be the rule of the opening statement. It is asserted that the plaintiff multiplies his difficulties if he subjects the jury to eloquent exaggerations and then falls short of his promises. With this I concur. Yet, in complex litigation, I submit that one may take whatever risks are entailed in order to tell a coherent story at the beginning of the case. If the lawyer can hang the facts together by telling each a story with a beginning, a middle, and an end, in addition to categorizing, keeping motivations in the open, and maintaining their interest in why things happened, he will be likely to have a jury that remembers what he is proving during the trial. If the jury remembers a lawyer's words and if the lawyer does

not have an instinct for self-destruction, it must be assumed that they will be favorably inclined towards his case. If self-destruction is the end to be achieved, it may be done in an opening statement by recounting for a period of two hours or more every name, date, and factual detail in chronological order leading nowhere.

There is a distinct tendency in complex cases to become enmeshed in irrelevancies. A picture comes to mind of a fireman attempting to save a building while an arsonist is busily lighting brush fires all around it. There may be a natural temptation to put out the brush fires, but that can only be done at the expense of the main object—the building. So it is with litigation. Counsel frequently light a great many brush fires in the hope of distracting their opponent from the main business at hand. One is highly susceptible during trial to the temptation to put out every fire. In most instances this is not only impossible but undesirable; brush fires have a way of starting other brush fires. When counsel has twenty central facts he must prove and each of these central facts must be proved by five or six subcategories of fact, he cannot waste time on brush fires.

To maintain control it is advisable for counsel to list every fact central to the proof of his case on a separate sheet of paper and then list under that fact the evidence which will be introduced to prove it. That evidence will be produced by witnesses and by documents. When this task is finished counsel has created a road map, a check list for his direct examination, and a listing of the documents he needs to introduce in his own case. Counsel should also list the central facts which he expects his opponent to attempt to prove, the witnesses the opponent will probably use for that purpose, and his probable documents. This exercise will inevitably educate counsel, provide him with a strong basis for the preparation of his own witnesses for cross-examination, and reveal the weaknesses of his own case.

The sheer number of witnesses who testify at a complex case can be extremely wearing upon counsel during trial. Therefore, preparing examination and cross-examination well in advance is imperative. The question often arises as to whether the cross-examination in a complex case differs substantially from other cases. It does. It is astounding how many misstatements of facts are made in complex cases by witnesses on both sides. The reason for this phenomena is apparent. The parties are not dealing with one central factual occurrence, as in a tort case, but rather with a whole panorama of scenes which may have taken place over a period of years involving many people and hundreds of documents. The wit-

nesses, quite naturally, tend to selectively recall those matters most favorable to their positions. Hence, cross-examination by reference to documents is frequently protracted. Often, however, there are so many documents in such litigation and the documents themselves are so conflicting that both sides are impeached by them.

It is not a particularly inspiring sight to the average juror to see a lawyer, armed with a stack of notes and documents a foot thick, begin questioning a poor witness on every detail that occurred over the past four or five years in the hope of forcing some trivial error in his recollection. The jurors' natural sense of fair play will cause them to root for the underdog who must rely upon his memory against the lawyer with that overwhelming pile of paper. Even the impeachment of a witness by his own deposition may be ineffective when that witness is faced with the task of remembering word for word some five or six volumes of his own testimony. Of course, the juror may also be rooting for the witness because he can anticipate the inevitable lengthy examination which will result from the stack of papers and depositions in front of the lawyer.

How then does counsel overcome this natural sympathy for the unarmed witness on cross-examination? One obvious way is to disarm oneself, *e.g.*, work with hands free of the lawyer's natural weapons—his papers and notes. In short, avoid reading questions. What may be lost because of memory failure may be gained by the sense of fairness and intensity of an examination without notes. The examination is then "live" not canned.

Cross-examination may be the most important and creative work the lawyer can do in a complex case. It should be prepared in a painstaking manner, each point or critical question listed, each document to be used listed beside each point. Before cross-examination the points or questions listed should be read five or six times and set aside. One should then be able to pick up eighty to ninety percent of his examination without returning to notes. The remainder may be completed upon a re-direct examination.

A point about the use of documents in cross-examination should be emphasized. Antitrust and securities violators are not common criminals and cannot be treated as such. If the jurors have been told that the defendants are villains and scoundrels, they will be most surprised when a kindly-looking white-haired gentleman, who appears and talks like everyone's ideal grandfather, takes the stand and announces that he is the chief executive officer of the defendant. How does counsel impeach him, attack him? One of the most effective means is the technique of grouping documents on the same subject. Perhaps one document written by a staff member

may be overcome, but a series of documents, each making the same point with ever-increasing intensity, will become devastating if the witness tries to avoid their impact. Judge Learned Hand, commenting about a hapless witness named Bedford, caught in such a dilemma said:

> The documents were never intended to meet the eyes of anyone but the officers themselves, and were, as it were, cinematographic photographs of their purposes at the time when they were written. They have, therefore, the highest validity as evidence of intention, and, although in many instances Bedford attempted to contradict them, his contradiction only served to affect the general credibility of his testimony.[1]

Thus, one may indeed impeach with documents. What is the most effective way to do this? It seems that the best traps in cross-examination are sprung slowly and carefully. This is not accomplished by a question such as "Isn't it true, sir, that you have been monopolizing, fixing prices, and refusing to deal?" followed by a long reading of the allegedly incriminating document. Whenever there exists a strong control either in a document or a deposition, and the question is not critical, one should try the non-leading form which allows you to pull the witness back when he seeks escape. Counsel appears more fair, the witness appears more evasive. In a complex case counsel may be before the jury for weeks or months; his fairness and patience, not his brilliant advocacy, are the impressions which he wishes to leave with the jury. In protracted litigation, an overdose of the leading question and constant badgering of respected citizens, can make counsel, not the witness, the villain.

(B) *The Trial To The Court*

There is a real chance that both sides would prefer not to have a jury. Perhaps injunctive relief is sought. Perhaps both sides have faith in the ability and objectivity of the court. Perhaps, for excellent reasons, they are both afraid of a jury.

If the case is tried before the court, it is submitted that the single most important thing that counsel may do, other than his actual performance in court, is to set forth one's case in a strong trial brief. This will be the first chance counsel will have to impress the

1. United States v. Corn Products Refining Co., 234 F. 964, 978 (S.D.N.Y. 1916) *appeal dismissed* 249 U.S. 621 (1919).

court and the first impressions are often the final impressions—even with a judge. The brief itself should disclose every major point one intends to prove. Trial by ambush may be quite effective with a jury, but the advantage gained is not worth the disadvantage of having one's case misunderstood by the court from the beginning.

A good trial brief compels counsel to prepare his case. Just as judges have admonished each other to see that counsel are prepared for the big case so it is that counsel should see that the trial judge is prepared so that he may run an orderly courtroom. Orderliness, however, is not a characteristic feature of most complex cases. The trial court's apprehension about wasting time is centered early in the case upon the apparently endless squabbles over discovery that may ensue between the lawyers.

If the trial judge is not made aware of the discovery problems as soon as possible, and the parties are left to try the case as they please, it will follow almost inevitably that the party with the "deepest pocket," meaning either greater resources or a greater willingness to expend its resources, will flood the court with pre-trial matters. Where both parties are relatively equal in size and determination, it is almost assured that the record will proliferate immensely in the absence of judicial control. The basic reason for this behavior, it seems to me, is that each party is (a) testing the willingness of the other to work, (b) testing their ability to spend money, and (c) measuring the patience of their opponent.

To avoid this nonsense it seems clear that early in the case counsel should disclose to the court his plan for discovery. The plan should be designed to assure the court of his good faith, his industry and his lack of interest in harrassing his opponent. A model plan for plaintiff's discovery might follow the following course:

First. The filing of an initial document demand and initial interrogatories contemporaneously with the filing of the complaint. Additionally, consideration should be given to filing a request for deposition of the officer of the corporation having knowledge of the whereabouts of the relevant corporate documents. These three filings are all designed to accomplish one purpose: early production of documents. Initial discovery efforts should be concentrated towards early accomplishment of this goal.

Second. The initial production of documents will inform counsel of two things: (1) The need for depositions, and (2) the need for a second document demand which is the "rifle shot" demand.

Third. Counsel may then follow with the critical depositions. Counsel should be prepared to set time limits for each of these efforts. When one has demonstrated some ability to accomplish the

tasks within the specified limits he can then report to the court when he will be ready for trial and can negotiate concerning the issues to be tried.

IV. The Problem of Judicial Control

At their various judicial conferences trial judges have for years been grappling with ways and means to bring order out of the chaos created by the big case. Unfortunately, their efforts to accomplish this goal tend to give aid and comfort to the defendant. A short excerpt from the *Judicial Conference Manual on Complex Cases* will set the stage:

> The potential range of issues, evidence and argument is so great, and the necessities of adversary representation so compelling, that the activities of counsel will result in records of fantastic size and complexity unless the trial judge exercises rigid control from the time the complaint is filed.[2]

That "rigid control" which the trial judge is urged to exercise will most likely fall heaviest upon the plaintiff. The principal reasons which judges have seen as causing confusion and delay in big cases are (1) vagueness of the issues, (2) proffers of masses of unnecessary evidence and (3) lack of organization of material and personnel. Vagueness of the issues is the item most troubling to the plaintiff. A favorite gambit of the defense is to force the plaintiff to narrow the specific issues in a big case before discovery is completed. That way counsel may hope to dodge the incriminating document, the "smoking gun," and force the plaintiff to stipulate part of his case away. Preclusion orders are frequently entered by the courts with respect to matters outside the designated issues, and it is difficult at best to claim surprise or show good cause for an expansion of issues after they have been set.

When the plaintiff resists a narrowing of the issues he leaves himself open to this statement, "Judge, the plaintiff has brought this case in order to discover whether he has a case. He has no proof, only suspicion based on rumor, speculation, or hearsay." But the fact that one's client has no "proof" in the formal sense should not preclude one from using reasoning powers to determine the likelihood that such an offense occurred. For example, suppose the client believes that there has been price fixing among his suppliers. He has no "proof" of this; no one was present representing counsel's client

2. Committee Report: Procedure in Anti-Trust and Other Protracted Cases, Judicial Conference of the United States, 13 F.R.D. 62, 66 (1953).

when the conspirators conspired; no one delivered to him a copy of the agreement of conspiracy; yet he has observed that certain patterns have emerged creating a reasonable belief that prices are being fixed. Thus the need for thorough discovery on the merits before the narrowing of the issues is obvious.

How does counsel protect himself from a narrowing of issues? An early demand of the damaging documents is the best protection. What documents? Of course, the document demand varies from case to case, but there is a pattern. Generally speaking, there are four classes of documents which may be the subject of a search. First are raw data which include invoices, checks, and so forth. Secondly, there are the summary documents—the accounting ledgers which summarize the invoices and checks. These documents themselves are summarized by six-month reports or year-end reports. Occasionally, a company will have a five-year summary of such documents. The annual reports of the company and the data in Moody's Industrials are of great assistance in suggesting documents to be sought of the summary accounting nature.

The third level of documents are those which may have the most criticial import for the case. These are the sort of documents which are prepared for management meetings, i.e., for consideration of policy changes or presentations to management for their consideration in adopting a new course of business conduct or changing a previous course. These documents are frequently designated as forecasts or market studies. The most fertile sources of such forecasts are the marketing and sales divisions of the company as well as its information and research divisions. Sales performance and trends will be analyzed by a corporation. This analysis is often of inestimable value. Documents encompassing research as to whether a company should go into a market or get out of a market are very helpful. In addition, information derived from scouting reports of competitors' activities, compiled by research teams, are also extremely important. Memoranda of conferences between executives, agenda documents for meetings, sales presentations or suggested sales presentations, all provide a fertile field for review. Sales manuals, sales reports or summaries of sales reports are also extremely important. Likewise organizational charts with job descriptions are important documents to determine deponents.

The fourth level of documents are documents involving counsel's client. In this regard, all documents concerning the client, regardless of their location, should be sought or examined (with the possible exception of invoices). In instances where the companies involved are dealing with each other on a daily level this may be

impossible, but it is clear that correspondence between executives of the companies must be examined. Summaries of purchases or sales, memoranda of conversations, all become critical. These are the documents most likely to become evidence at trial.

Of course, retaliation against discovery efforts is to be expected. But if the client is relatively small, there is only so much that can be done by the large opponent. The very fact of smallness makes it easier to answer voluminous interrogatories. There are fewer people to depose and the production of documents is not nearly as fearsome a task. Counsel in a complex case should expect extensive interrogatories, complete document requests, and multiple and sometimes totally unnecessary depositions. All of this, however, should not be looked on with dismay. There is an educating process at work. To answer the interrogatories, counsel will have to learn the hard facts about his client and the strengths and weaknesses in his case. To defend the depositions, counsel will have to learn the personnel critical to the case, their strengths and weaknesses as human beings and executives. Finally, of course, counsel must examine the documents produced in response to the opponents document requests since many of them may contain information useful for his own purposes.

It is the rare complex case that will not require experts to appear for each side. Complicated economic data or other facts of a specialized or technical nature are the typical subject for expert testimony. In this regard, it should be noted that there is a true difference between fact and theory. Certain facts may be well known to experts in the field but may be so technical as to be extremely difficult for laymen to understand, and proof of such facts consists of expert testimony. Of course, such experts will differ as to the conclusions or theories which they apply to the same factual data. Where such experts differ in their conclusions it is usually because either their basic material is different, or the process by which they fashion their conclusions from that material is different. Resolution of the differences in the testimony of experts is not a routine task. Where laymen differ, the fact to be established is usually an event and the differences between the witnesses are differences in truth-telling or in opportunity for observation. With experts, however, the facts may be scientific facts or of such complexity that enormous amounts of technical data must be known and understood to enable laymen to make a choice between the conflicting opinions.

As a practical matter, therefore, the careful lawyer presenting expert testimony to a jury must be careful to select an expert who will make a good witness as well as possess the necessary qualifica-

tions. An expert with excellent qualifications but obnoxious in his personality or, to a lesser degree, arrogant or pedantic, is worse than no expert at all. Conversely, one who is local to the region where the case is tried, familiar with the general economics of the area and possessed of a "practical" as well as a theoretical side presents a far better appearance. In summary, the expert should have "common sense" or at least the appearance of such.

V. Observations On The Closing Argument

Obviously, there is no formula which will produce a successful closing argument in complex cases. The closing, perhaps more than any other feature of the trial, is the signature of the individual attorney. His style and talents are then more on display than at any other time. Nevertheless, some general observations can still be made about the closing argument.

In complex litigation the closing argument is more important than it is in conventional litigation. The jury has been deluged with testimony from numerous witnesses and information from a depressingly large volume of documents for weeks, perhaps months. They know that they are expected to render a verdict based upon reason but at this point they may doubt their ability to manage this apparently awesome task. It is usually wise, therefore, to deal directly and straightforwardly with the issues the jury must decide; indeed, this may be the only time during the trial when the jury is told in so many words what the issues are that they must decide. One cannot go far wrong by stating an issue, analyzing the evidence for each side, and then using all the forensic skills at one's disposal to resolve the dilemmas presented favorably to one's client.

In the course of this resolution process, it is not effective to require the jury to rely upon their memories; this is the essence of the difficulty they have been experiencing—there is so much to remember. It is far more effective to demonstrate graphically the significance and weight of the proof. Much has been written about the use of demonstrative evidence in the course of the trial but very little has been said about demonstrative evidence in the closing argument. A judicious selection of evidence presented graptically to the jury at closing has real impact because resolution of the factual dilemmas by reference to the evidence itself is highly persuasive. Thus, excerpts from the trial transcript or the documentary evidence may be blown up photographically. Charts are effective. The effect of these tactics is that the jury's memory is not being tested; if they can see, they can be persuaded.

Emotional appeals have a place in criminal or tort cases but even then the emotional appeal must be founded upon a strong factual base. One must possess a talent greater than any I have observed in the courtroom, however, to bring a tear to the eye of a juror for the plight of the typical businessman. Indeed, the businessman may be frequently perceived by the juror as a man seeking an enormous windfall which the juror could never hope to obtain in his entire lifetime. Logic and reason are, therefore, the best tools for constructing the final argument in complex litigation.

Finally, it is critically important that counsel have prior detailed knowledge of the judge's charges to the jury before those charges are given. With the charges known, counsel may in his argument refer to instructions that the court will later give. This should be done carefully and under no circumstances should the court's instructions be overstated. Nevertheless, two or three of those rulings will be extremely important to the case and reference to the fact that they will be forthcoming is highly effective in impressing upon the jury the belief that the law favors the argument which counsel is proffering.

VI. Conclusion

In summary, the demerits of engaging in complex litigation are obvious. Such cases impose enormous time strains on counsel. They are frequently critically important to the economic survival of counsel's continuing clients and accordingly charged with an excessive emotional investment. Finally, counsel's other cases will suffer unless he has abundant help. On the plus side of the ledger, the greatest virtue of complex litigation is not the fees which are generated, although these are, by any standard, quite substantial. The most difficult and challenging tests of a lawyer's imagination and courtroom abilities are found in these cases and for that reason, alone, they have a special attraction to the lawyer who believes that a substantial part of the pleasure of practicing law comes from the knowledge that he is getting better at it.