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Pre-Trial Aid to the New Advocacy

Melvin M. Belli

PRE-TRIAL: AID TO THE NEW ADVOCACY*

MELVIN M. BELLI†

Justice Murrah and you have honored me, a trial lawyer, or *advocate,* if you will, by your invitation to negate "the complaint among some, that *pre-trial is destroying the art of advocacy.*" I was urged, in your most, and usual, graceful and respectful judicial manner, that I "must adhere, in the interest of time and the importance of this subject, to this specific phase of pre-trial." Justice Murrah admonished, "We should not forget that the purpose of the pre-trial is to *strip* the lawsuit to its bare factual and legal *bones.*"

At the outset, may I pause to say I am happy to note that Justice Murrah subscribes to this expression "pick the bones clean." I had thought, heretofore, that admonition was currently being reserved for insurance companies' stockholders' reports in reference to their *corporate* bones when treated by my *Adequate Award!*

I think you would know that I must favor an adequate pre-trial as much as I do the Adequate Award, for the definition of the adequate award is "fair," "just," "equitable," and "realistic" compensation (it is not, as some slander us, the *"excessive"* award), and compensation is not "fair," "just," "equitable," and "realistic," unless it is *speedy* compensation, a verdict or a settlement, or an award after appeal, returned somewhere in point of time to the date of the injury. A two hundred thousand dollar personal injury award for a bilateral extremities amputation after a trial five years from the event of trauma, couldn't be an *adequate* or just award. Time has destroyed the money yardstick.

So if you hold out promise to me, and what's more important to all of us, to our clients, the laymen, of just awards more speedily achieved, of a procedure helping to unclog our calendars, I, as a trial lawyer and advocate, vote officially for it.

I come directly to the precise subject assigned me. I quote from my book, *Trial and Tort Trends of 1956*:

> Pre-trial has been the bastard of the law. More than that, it has been a premature bastard. However, I predict that like the bastard turned genius, its paternity will be claimed by many within the next several years . . . . It is heralded by some as the "end of advocacy," since everything must be "thrashed out" and not only no *surprises* left for trial, but practically no trial left. . . . I have seen and been a party to the most rigorous pre-trial in many states. Unfortunately, its procedures vary state to state. Partic-

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† See Contributors' Section, Masthead, p. 66, for biographical data.

ularly in Detroit [Michigan] where pre-trial originated, have I tried cases, and certainly there is no "end to advocacy" in that jurisdiction. On the other hand, if pre-trial operates as intended, advocacy can bloom as never before, and counsel will then deploy his talents to the major aspects of the lawsuit remaining undetermined and not to obfuscating details.

What is This Advocacy?

But, first, let us determine what is this *advocacy?* Then let us discuss really whether you judges and justices *want* to preserve it, or do you intend insidiously to make inroads upon it by pre-trial and some in camera sessions, then slip into an autocratic or a workman's compensation system which would completely abandon trial by jury and advocacy.

To begin our discussion, let us examine some of the canards currently being culled by the layman, the magazines, and the press, for our mistress, Modern Trial Law. Deserved or undeserved?

Several years ago, after attending a number of local and national bar association conventions, I came to the conclusion that the forgotten man at a bar association convention was him for whom we exist, if we are true to our profession, "our client"! We discussed our fees, our social events, our prestiges, our election of officers (which latter event never seems to take much time or entail vigorous contest since this is rather a cut and dried affair), and the place of our next convention. Very, very little was said for, of, or about the layman, the client. Indeed, personal injury law, which today is 75% of all trial law, was as deliberately avoided for a discussion topic as would be *condylomata acuminata* at the regular Thursday meeting of the ladies club. Recently, there has been a healthy change to consider some of these things that very importantly affect the layman and incidentally give us our only excuse for existence—his welfare, his rehabilitation, his personal injuries.

Perhaps we began to see the handwriting on the wall, as well as in the public press. The layman is getting pretty well fed up with us. First, there were the clogged court calendars of four and five years. Then, the costs of litigation, the two and three years' delay on appeal.

Personal injury lawyers began to ask questions, and the layman began to ask questions. Pre-trial is one result of the questions asked by the layman and by the advocate himself. Now we are to determine, typically enough, will it end advocacy? I believe our first inquiry should be, is it good for the layman? Our second inquiry, will it end advocacy? Fortunately, if you accept my definition of advocacy, the courses are synonymous.

I am particularly pleased to speak to you as a trial lawyer and, although I spend considerable time lecturing and writing, I hope, a practi-

cal trial lawyer. I've not had an easy nor gracious time disseminating my ideas, but as I went about this country, I found very few judges who would not listen to me, who would not hear out my procedures of modern trials and demonstrative evidence, even though they did not at first agree with me, provided I met them half-way and *preliminarily explained the relevance of each proper procedure.*

Bar Associations Critical

Unfortunately, a number of bar associations were most critical, even before listening, and their criticism was not constructive, either for me, my brothers at the trial bar, the modern law, or the layman, him whom we must all consider, whether we be lawyer or judge. Some bar associations considered that the profession of law was created solely to perpetuate the profession, for the benefit it would bring to its members, rather than to be the servant of the lay person, the client, the citizenry. They considered themselves the principals, the clients, their causes, the incidentals.

Unfortunately, some trial lawyers, and on the personal injury side, acted likewise. I recall the story told of the southern lawyer with the reputation for charging high fees. Came to his office one day a new client, who expressed, upon the initial meeting, trepidation as to the size of this lawyer's fees were he to represent him in his personal injury case. Said this opulent, forensic battler of the south: "My friend, what you've heard about me and us lawyers is entirely untrue. To prove it to you, I'm not going to charge you one single cent as a fee for representing you —as a matter of fact, to prove to you how generous we lawyers really are, I'm going to give you half of everything we collect from your lawsuit!"

I should say, at the outset, I've not had the pleasure of trying a case against any of you, that is, when you were advocates before your ascending the Bench. I do recall, however, there is one of you who did oppose me on my first case after I had passed the bar; it was after California had adopted its "commenting on the evidence" statute and this lawyer, who was the then District Attorney of a county near mine in San Francisco, offered a comment on the evidence to the trial court that poor Louie, my defendant, had bought the poison for domestic purposes other than killing the rats about the house.

My client and I felt very bad when he was hanged, although his grief was shorter-lived than mine. I was particularly chagrined when this District Attorney subsequently introduced me at political gatherings as "the next speaker, a young graduate from the University of California,

who, when the trap was sprung at San Quentin last Friday, had half his practice wiped out!"

Well, the case was *People v. Gosden,* in 6 Cal. 2d 14 (1936), and the District Attorney went along to achieve a fair amount of success in the law profession—he is our honorable Chief Justice Earl Warren! The only moral I can give you to this case is to say: "Just look at him now, he hasn't got a single client to his name!"

Since my name has so frequently been coupled with a phrase of legal modernity, "The Adequate Award," at the outset I say that I shall not attempt to infuse this subject into the discussion (only indirectly) today. Chancellor Kent gave us a yardstick which we still employ in constructing the adequate judicial edifice. He said if the verdict is the result of "passion and prejudice," the product of an "inflamed mind," it is excessive. Indeed, one jurist commented that the verdict must strike a reasonably prudent person at first flush as "outrageous."

To define "advocacy," in an address, "The Modern Trial Lawyer," that I made last fall before the International Academy of Trial Lawyers in New York, I tried to determine a definition of what is *Law.* And I first dutifully reported Joseph Choate's pontification, "Law is the expression and perfection of common sense." Of course, I did that because in all lawyers' speeches somewhere along the line, Abraham Lincoln, Blackstone, or Joseph Choate is worked in for a sort of converse self-serving "guilt by association" accolade. I discarded the Great Ones' definition for the statement, ironically enough, of one dishonored in his respect for the law, Aaron Burr. "Law is whatever is *boldly asserted* and *plausibly maintained,*" he said. I like this definition better than any I've seen because it takes the straight-jacket from the common law.

While giving law its essential objectivity, such definition, too, gives it the probabilities of vigorous growth, of malleability to modernity. But more than this, it gives us as an integral part of our definition the awareness of them who we all are, *lawyers.* Without the lawyer there could be no law for it is his function, his profession, nay, his duty "boldly to assert and plausibly to maintain."

Necessity of the Lawyers

In the political arena, the late Senator Joseph McCarthy said: "We don't need lawyers or defenses, we know who are the malefactors!" But, actually, do we, politically, any more than in our civil courts, without advocacy, know what is the adequate award, or in the criminal court, the adequate punishment, unless both sides, respectively, boldly assert and plausibly maintain?

I recall the story of an old Irish judge, who came upon the bench one irate morning (I mix the figure deliberately because, though I could give horrendous examples to the contrary, only an Irishman really can know what is an "irate morning"—and particularly after a delightful "night before"): "I find for the defendant!" abruptly announced his Lordship, without having heard a word from plaintiff's counsel.

"But my Lord—" began plaintiff's counsel. Whereupon, his Lordship said: "Fifteen minutes' argument then—no more."

Plaintiff's counsel argued valiantly, commandingly, so convincingly that when he concluded, and as defendant's counsel arose, as a matter of course, to reply, his Lordship barked: "Just a minute—I made up my mind once, before coming here this morning. After hearing plaintiff's argument, I've changed my decision and find for him. Now I don't want you to argue and make me change my mind again—what would these lay people, your clients, think this law is, black one minute, white the next?"

So it is important that we understand what *is* advocacy before we determine whether we must maintain it or discard it. If pre-trial is inimical to its perpetuation, pre-trial, not advocacy, must go. Therefore, I give you another concept of advocacy: "The sparks of conflict shed the light by which justice may be seen!"

Now we're probing very close to the *vena cava* of our profession. But most importantly, we are talking about something our clients can understand, something for which they criticize us most severely: One advocate before a jury maintains the speed was sixty miles an hour. His friend for the defense, as plausibly and as vigorously, asserts that it was thirty. It is the advocate's duty to put his best foot forward, to paint his best picture for his client.

You are familiar with the famous English cases in which it was asked, "May an advocate defend a guilty?" The answer was, "not only may he, but must he."

The further question: "may an advocate defend a man he knows to be, and who has told him he is guilty?" The answer still is "yes," he must do everything he can for him, *within the law*. No man who lives with heart and soul so black, but that something cannot be said for him, by another human being, let alone an advocate.

However, *knowing* him to be guilty, must the advocate, both in England and this country, *not* say either in his statement of fact or as his deceitful opinion, "this man is innocent." (The nice distinction is set forth in *People v. Dykes,* 107 Cal. App. 107 (1930). Counsel, in stating

his opinion, in advocacy, to a jury, must say, "based upon the evidence," and in fact, his opinion must be based upon the evidence.)

The dictionary defines "advocacy" as pleading for or supporting, and an "advocate" as one who "defends" or "recommends publicly." So, again we see that our definition of Aaron Burr's "boldly asserting and plausibly maintaining" is the function of advocacy.

In preparing myself to talk to you, I looked again into Lloyd Paul Stryker's *The Art of Advocacy, A Plea for the Renaissance of the Trial Lawyer.* I looked at Justice Medina's introduction and I agree with his statement, "Increasingly over the years the 'orator' or spell-binder has gradually been going out of fashion."

Demonstrative Evidence

In some of our minds, there has been the feeling that the advocate or advocacy must of essence be dramatic or oratorical. But such is the same misconception with many of the phases of the Adequate Award and demonstrative evidence of which I have spoken and written so much these last recent years. I urge not demonstrative evidence for drama, nor blatant spectacle. Had I chosen that, I would have elected another forum. I urge these only for their relevancy, their necessity. A picture is not "gruesome," the exhibition of an amputated limb is not "grisly." Profferance into evidence of colored motion pictures is not "dramatic," they are admissible, *if* admissible, for one purpose alone: they must be relevant, they must be of probative value. Whether they are "grisly," "dramatic," "unwholesome" or "horrendous," is completely, utterly irrelevant.

Justice Medina ends his introduction to Lloyd Stryker's *Art of Advocacy* with the lofty statement: "When once the spark is fired and a young lawyer becomes thoroughly imbued with the grim determination to see that justice is done as between man and man, and as between man and the state, there is a reasonable basis for hope that this young man will dedicate himself to the cause of justice, as every lawyer should."

But I fear that some of you make such statements without fully appreciating that in order "to do justice, man between man," there must be the art of advocacy and the unbridled right of the advocate or lawyer boldly to assert and plausibly to maintain.

If you circumvent this right by cutting off the advocate in his opening statement, in his argument to you or to the jury, by "commenting on the evidence," by substituting your judgment for that of the advocate on pre-trial, by hurried consultation, then you do not permit justice to be done in advocacy.

I hope that I am not presumptuous in reminding you that especially important in these days of fear and hysteria and the need for lawyers who will courageously undertake an unpopular defense in pillor rather than praise, is the *duty* as well as the *right* of advocacy.

I am particularly privileged to speak to you because I sincerely believe in this art of advocacy, the necessity of the lawyer who is the professional advocate, to maintain in our way of life, whether in the political arena, the civil cause, in the Supreme Court of the United States, or in the police courts of the thousands of our halls of justice. I would bitterly denounce any procedure or institution which surreptitiously or directly infringed advocacy or the forum in which it is practiced.

Now we have defined "advocacy." We see it is a somewhat different concept from the layman's understanding.

The Forum of the Modern Advocate

Now we are to determine that the modern forum of the advocate is not alone the courtroom, that it may be in chambers in pre-trial, provided—and this is an important provision—the litigant, both civilly and criminally, eventually has the right and access to trial by jury upon all factual issues, if dissatisfied. Particularly should this be true in the federal court, historically, the "people's court" (I use the word "people" in its anti-revolutionary, that is *American* Revolutionary, sense).

Likewise, the modern judge may be and act as a judge whether on the bench, in court trial, or before a jury, or in chambers on pre-trial. He may preserve advocacy in all three instances. He may just as well destroy it in any of the three, *i.e.*, by brutal evidentiary comments before a jury, by arrogant conduct in trial by court, by informal, caustic and uncalled for remarks in chambers on pre-trial.

The ancient institution of the "court" is the judge, whether sitting or traveling, in his own jurisdiction, or elsewhere. A wife is a wife, whether at home, in the bosom of her family, with her husband, or socially away from home, when her husband is not present. She may demean herself in conduct the antithesis of wifely virtue. So may the judge demean himself in the freedom and informality of pre-trial compared to the formal courtroom.

Even he who secretly fancies himself the greatest of modern trial lawyers, and therefore, lacking humility, is probably the least, should be satisfied that pre-trial gives him even greater opportunity to ply his art. In the specialty of surgery, the patient is wheeled into the operating room. She has been preliminarily sedated, she's been scrubbed and sterilized, she has been draped, the instruments are set out, she has been

surgically "pre-trialed," both in the doctor's office and the hospital. Only then does the surgeon begin his actual surgery. That operation will not start until this patient is thoroughly prepared because, other things being equal, a good operation is a fast operation.

Could it be said that because there is more and detailed preparation and research and investigation preoperatively in surgery today that the specialty of actual surgery itself is being abolished? To the contrary! The skill of the surgeon is truly greater now than ever before. It should be no different with the modern trial: busy jurors should not be kept waiting to watch the laborious, and sometimes distasteful "scrubbing" and "preparing" that can go on interminably in the court in the case that hasn't been pre-trialed. Not only is our modern jurors' time too valuable, but they will lose sight of the important points in the case if there is too much irrelevant preparatory detail. True advocacy compounds analysis, terseness; it does not include delay and confounding.

Of course, that preparation in the pre-trial must be as meticulous and as searching and as exhaustive as the preoperative preparation of researching and X-raying, case history, diagnosing, studying, sedating, scrubbing and draping in surgery, or, no matter how adept or clever the surgeon, the whole operation, as the trial, will go awry and become infected with irrelevant contaminants for lack of proper preparation.

A little bit of pre-trial in a given case can be as useless, nay as dangerous, as a little bit of asepsis before surgery!

The layman resents the haggling by counsel over the introduction of an exhibit, whether it's a glossy print or a dull print, whether it's a large picture or a small picture, whether it's "inflammatory" or "prejudicial," whether it's a distortion, whether it's relevant. Whole mornings may be spent in such bickering while the jurors restlessly watch the clock. Certainly, it is not the abolition of advocacy to determine whether this picture, this exhibit, should or should not be admissible beforehand.

In the field of demonstrative evidence, I have found rare instances in which my exhibits of models, mock-ups, aerial photos, colored pictures, motion pictures, sound motion pictures, news shots, physical objects, were refused admission into evidence, because in every case, I had apprised the trial judge before trial of my precise proof and submitted the points and authorities. This has been done in jurisdictions where there were no pre-trials. Certainly, it did not deter my advocacy with demonstrative evidence, that, on trial, I could go directly to the exhibits without having to haggle, discuss and argue them before the jury. With pre-trial, the profferance and ruling upon these exhibits does no more than put into effect what I had advocated in my lectures on the use of demon-

strative evidence, *i.e.*, that all of these should be explored beforehand. Surprise today in our courts rarely is an element of advocacy.

I have used the expression: *"the trial of the modern lawsuit is a race of disclosure."* I have said that today's trial is the explanation and portrayal and use of everything in counsel's briefcase as fast as he can get it out and before the jury. With our modern discovery procedures, the respective sides know what the other party has. If they do not, they are derelict and should know. Cannot rulings be made upon the admissibility and the availability of these various bits of evidence known to both sides before trial in formal pre-trial orders?

I recently tried a medical malpractice death case in Pittsburgh, Pennsylvania, presided over by able Federal District Judge Rabe Marsh, Jr. We had a thorough pre-trial, at which both sides were asked to disclose the names of their witnesses, the names of *all* of their witnesses, both lay and medical, to display *all* exhibits, *all* of the procedures to be used.

While I was trying this case, I saw what happened to a lawyer in an adjoining court who had failed to disclose the name of one of his medical witnesses: this lawyer's case was on trial into its second week when he called a medical witness whose name had not been disclosed at pre-trial. As soon as this medical witness was seated in the witness chair, defendant's counsel asked for a mistrial, and it was granted. The judge's reasoning: "I cannot allow this doctor to testify because under pre-trial rules his name was not divulged when it was requested. But I must go further than this, since, though not allowing him to testify, the jury has seen him take the oath and go to the stand. They may feel that, being called, he had important testimony for plaintiff, which he was not allowed to give since he was recalled. Therefore, the only way to remedy this wrong will be to start the trial all over again"!

Malpractice

Advocacy today is at its most distorted concept in the medical malpractice case. Every judge here knows of the *ancient medical therapy still being modernly applied: the conspiracy of silence!* Every judge here, at least off the record, knows of the truth of George Bernard Shaw's words about the medical profession: "We are not a profession, we're a conspiracy."

I do not mean to offend by discussing "The Doctor's Dilemma" today. I ask, though, recognizing the hypothesis of this conspiracy of silence, what can pre-trial do in this type of case not to abolish advocacy but to restore it? In the face of condoned perjury, there can be no true advocacy for one cannot vigorously and plausibly assert (our definition).

The facts are as shifting sand, the foundation as undependable. So advocacy in the malpractice case is generally not that at all: it's a play, generally a tragedy. It's a distortion of justice, a reflection of hypocrisy in our courts.

I have noted, however, that while there are fewer medical malpractice cases federal-wise, the federal judge scrutinizes the problem of medical testimony more carefully than the state judge does.

And the layman is becoming soundly disgusted with the doctor who refuses to testify against his brother doctors. He is also disgusted with the doctor testifying for the other doctor, and the lawyer as well, on both sides, the judge and the law that countenances such a tragedy in the courtroom.

What can pre-trial do to restore advocacy in the medical malpractice case? Should the trial judge be more vigorous to assert himself in one type of case than another? I do believe if ever there were opportunity for firm judicial hands in pre-trial, it should be in the medical malpractice case. I hope to see some pre-trial judge enter an order based upon his own ferreting of the facts or calling expert medical witnesses of his own motion in pre-trial in this type of lawsuit!

At least the medical pre-trial should obviate one gross injustice that mocks advocacy in the malpractice case. I noticed recently in several jurisdictions, widely separated, that when a community doctor is on trial for malpractice, the wives of the various doctors of the community flock to the courtroom to take prominent seats where they can fawn on and smile at members of the jury. But more than this, medical witnesses are called by the defense not because of proficiency in the particular subject, but because of their having patients on the particular jury! At least, on pre-trial, rules can be made with reference to doctor-witness disclosure, so that later in court the advocates will not be practicing before a stacked house.

SETTLEMENTS

The goal of all lawsuits must be disposition of the controversy and as soon as possible. There should be no advocacy for advocacy's sake alone anymore than should there be an unnecessary or a prolonged surgical procedure.

Ideally, there would be no lawsuits for there would be no controversies, there would be no lawyers, there could be no advocacy. But we know that as we are human beings, as long as we have a society as we know it, and as we like it, there will be advocacy or the plausible maintaining of adverse interests on the local, the national and unfortunately, on the international level, although on the international level,

what we are inventing (and not in the courts or the legislatures) both here and abroad, may end international advocacy for all of us in a ball of white smoke!

It is the advocate's duty to settle a lawsuit without taking his client to court, just as much as it is the doctor's duty to heal, when possible, by medicine rather than by scalpel. The latter, like the lawsuit, is not only more painful, more expensive, but it takes longer to recover therefrom.

But if we settle all our lawsuits, then don't we end advocacy? Not at all. I settle twenty-five out of twenty-six of my cases and still I am in court almost every day of the year (except, of course, when I'm on the sawdust trail preaching the adequate award and demonstrative evidence). But I have to maintain my advocacy in court on trial in order to keep up my settlement value. Let me lose two in a row, and the value for a case in current negotiations drops precipitously. Let me go into a low verdict center and be successful in achieving an adequate award and immediately, the value of cases, both on settlement and on trial, rises. This pronouncedly happened in Mississippi and, last summer, most dramatically, in Montana, where we tried a case resulting in a verdict of $183,000. The highest verdict theretofore in Anaconda, Montana had been $30,000. Immediately after judgment, upon the verdict being entered for $183,000, settlement demands went up all over that state, doubled and trebled, and what's more important, were recognized as being fair, values having lagged theretofore, utterly inadequate. Furthermore, these demands were paid. This is not a hearsay statement. This is a report to you based upon some two dozen letters from judges and lawyers throughout Montana.

I discuss settlements with you, because, though not accomplished actually in the courtroom, they, like pre-trial, demand the highest type of advocacy. The modern client is no longer as interested in his lawyer's gestures, sartorial raiment, elocution, histrionics, and forensic flourishes as he is with his advocate's ability practically and materially to answer his question: "How much and how soon for me and my family"? The average American, fortunately or unfortunately, has learned to expect succor from the nursing bottle to the streamlined hearse. Quite naturally, therefore, he has little sympathy for an advocacy of form rather than substance.

But the highest skill must necessarily be employed not only by both counsel, but by the trial judge to achieve an adequate *settlement* in *pre-trial*. It is not necessary for a judge to be on the bench, or to litigate before a jury in the jury box, for an advocate to practice the art of ad-

vocacy. It can be done in the judge's chambers in pre-trial. I hope I never have confused advocacy with histrionics or forensic drama.

Brochure

Do not forget that Perry Nichols, of Miami, Florida, and I originated the "brochure method of trial." Indeed, I have a chapter on this in my *Modern Trials*. This "brochure method" is nothing more than an informal, unilateral "pre-trial" whereby I take every fact on liability, every element of damage, every researchable point of law, put these into a book along with my realistic demand for relief, and present it to the defendant or the insurance company. I say: "This is our case. We are making a demand which you may think is for a lot of money, but we can back it up. Here it is. We are not hiding anything, in fact, you may think there's some 'gimmick' because we make this disclosure to you (and indeed, some defendants at first suspiciously so treated our brochure method of 'trial')."

I felt and feel that such brochure system of trial or settlement is advocacy at the highest level, although we're trying to *avoid* the courtroom instead of urging it. If plaintiff's counsel would come to pre-trial with his "brochure" having been served on defendant, not only could issues be narrowed but possible settlement achieved.

I feel it is unnecessary to have a "settlement calendar" separate from a "pre-trial calendar." Pre-trial can accomplish its purposes as well as determining whether there is the possibility of settlement. Of course, there is always the value of a third person, the judge, giving the advocates as many chances as possible to settle by calling them together on more than one occasion.

I believe that settlement advocacy requires just as much or even greater skill than a courtroom advocacy because one must still be, and let us be frank about it, a "horse trader" in settlement. But he must clearly distinguish between statements of *opinion* and statements of *fact*. One may not misrepresent facts of liability or damage to opposing counsel in attempting settlement. Otherwise, after a settlement is negotiated, if defense counsel or an insurance company learns of your deceit, you will and should be marked forevermore in future settlements. A settlement is not a singular one-day thing. It is part of one's reputation, practice, part of your future procedure to be judged by.

In every personal injury case, it is part of an advocate's duty to discuss settlement before bringing it to pre-trial, and indeed, in most of the cases, if there is not an actual, outright demand and offer, both counsel know pretty well what the other will do. Consequently, I believe it to

be the pre-trial judge's function not to state his opinion of the value of the lawsuit, unless expressly asked so to do by both counsel. This does not mean that he should not inquire "Have you discussed settlement" and even go further by saying, "What is your demand, What is your offer, Do you think you can get together, Are there facts presently undisclosed that if they were made available, would assist settlement?"

Such procedure allows advocacy on the part of both counsel and judicial demeanor upon the part of the judge. But some judges destroy advocacy, take the case away from both counsel when, without being asked, they state, brusquely and arbitrarily, their opinion in value of the case, of which they cannot be as familiar as the lawyers who have prepared it and brought it up to pre-trial. Recently, in Los Angeles, in a federal court pre-trial, there had been a $15,000 offer of settlement against a $25,000 demand. Without becoming fully or at all acquainted with the facts of the lawsuit, and only on a superficial perusal of the file, the pre-trial judge, hearing there was this $15,000 offer, and without even waiting to hear the demand, said: "$15,000 is high. I'd take it and run." Well, we didn't have the opportunity to "take it and run" (even if we had been so inclined), for defendant dropped his offer, upon this judge's comments, to $12,500.

But, as said by the King, in *"The King and I,"* "It is a puzzlement" when we check our statistics, at least in our office, and come up with figures showing that in 85% of our cases tried after offer, the jury verdict is higher than the settlement offer. Throughout the country I know that the plaintiff tries his worst cases and settles his best ones. He'd like to settle his worst ones, but insurance companies will not let him. And frequently, plaintiff's lawyers are forced to try cases that never should have been taken in the first place. This really is what is clogging our trial calendars today! These are the so-called "stinker cases" which are kicked over week after week. Plaintiff postpones the inevitable day of trial, but eventually has to go out, and in half of them, settles for what he can get "on the courthouse steps." But he has taken time and energy and advocacy from his deserving cases, he has taken the court's time, and the insurance company adds up its litigation costs in its premium statistics.

Now you may well say, in the example given above, that if $15,000 looked "high" to that trial judge on pre-trial, as a part of his judicial act of judging, he should so speak out so that an "injustice" would not be done to the defendant insurance carrier in paying too much money. And I am afraid some of you not only so think, but so act. For those of you who do, we've neither the time nor the right of subject nor forum to

dissuade you, since, may I remind you, and me, that my topic is preservation of advocacy in pre-trial. If you are sincere and you want to preserve advocacy in pre-trial, if you are not using it actually to by-pass the right to jury trial, to usurp arbitrary functions and clothe yourselves by means of the informality of a mandatory pre-trial with rights you would not dare exercise publicly in open court, then you would not make such a statement as that judge did, nor act in comparable manner.

Just as long as you realize what you do if you so act, then I've made my point that you are not concerned with preserving advocacy, and under those circumstances I would eschew pre-trial.

New York Rule 4

The other night I had dinner with the Metropolitan Trial Lawyers Association in New York. I heard them express their feelings concerning Rule 4 of the appellate division, which purports to regulate lawyers' fees in personal injury matters. And I thought, here, if this rule is maintained and similar judicial or statutory legislation spreads through the country, will that be the end of advocacy, for should we not have learned long since past, that honesty and integrity cannot be legislated into a lawyer anymore than can ability.

It is not in pre-trial that we see the end of advocacy. It is in such regulations. For if we regulate the lawyers' fees based on the assumption that he is unethical and dishonest and morally unequipped to deal properly with his client, then must we regulate every other phase of his activities: we must scrutinize the facts upon which he argues his case and make him file an affidavit that his argument is based upon facts before it be given, we must regulate precisely the length of time of his opening statement, his closing argument. We must zealously scrutinize his cross-examination and his direct examination, and, indeed, as has been suggested and is done in New York, how his client comes to him and the disbursal sheet which he files at the end of the case.

Impartial Medical

Then there is the *impartial medical witness* proffered to the layman as the ultimate arbitrator of justice in New York. It is he, not pre-trial, who ends advocacy. It is he who is offered as being able to answer objectively the age-old questions, "What happened to my body, How long will the wounds last, Will I get well, Is my injury permanent"?

As long as there is trial by jury, no federal judge, no judge in this country would turn to a jury and say, "I dismiss you, you are through, I am going to answer these questions myself." But, in effect, law does

this with the so-called impartial medical witness for that witness, clothed with the court's dignity of choice, pontificates the answer to the final medical question of prognosis.

Dr. Adams

It had been reported at one stage of our history, before a good Republican party and a good Democratic party attempted to solve it all, that "What this country needed was a good five cent cigar"! But for a long time, it has been known what ailing England really needed: a panaceum much more grisly than proffered to us: a good *murder!*

It wasn't *taxes,* it wasn't the dissolution of the Empire, it wasn't any supposed marital defection of the Prince Consort. It was just that a real, down-to-earth poisoner such as Crippen hadn't forensically recently been mixing his phials, that a Jack-the-Ripper hadn't been around. Furthermore, there hadn't even been a devastating cross-examination of an Oscar Wilde, and Sherlock Holmes had little use for the needle to sharpen his wits.

Then upon the scene of this deplorable morality came, or rather waddled, the delightful personage with a name as English as Smith—his was Adams, Dr. Adams, if you will. And Dr. Adams was a poisoner, at least it was so charged, and better still, not of one, but of many delightful old ladies, his patients.

This case seemed to have everything delightful: Rotund, cherubic Dr. Adams was as harmless, as learned, as downright benign in appearance as any defendant I have ever had in this country in a civil medical malpractice case, dressed in all the aura of righteousness, figuratively and actually, that his adept counsel and Lloyd's of London, his liability carrier, could afford him! Came the trial. It was almost a national holiday. The Attorney General arose to state that he intended to prove "beyond reasonable doubt and to moral certainty" that defendant Adams had planned, schemed and designed to achieve his testamentary adequate award not by blackboard and demonstrative evidence, but by the pill bottle! But, because there was no *pre-trial procedure* beforehand in this case, "justice prevailed," if we may use this expression rather loosely in this instance. The prisoner was discharged instead of "being done in" and every Englishman was satisfied.

What happened? Well, after the Attorney General had set his case through the testimony of several nurses, England's now hero, the defense barrister, produced the nurses' record books "lost" up until then, and proceeded devastatingly to cross-examine the nurses from their own hand-written entries and to destroy Regina's case.

Now, of course, had there been a pre-trial, plaintiff's counsel would have demanded these record books, they would have had to have been produced or been inadmissible at trial, Dr. Adams might have been convicted and the whole upsurge of British morale dampened, quashed and definitely detoured.

So, apparently the Englishman wants his trials and his advocacy that way. He still wants his surprises in court. But the layman and the lawyer in this country would now say such *"surprise advocacy"* will no longer be available with adequate pre-trial!

Pre-Trial—Not Control

Pre-trial should not be a usurped power to "control" the lawsuit, from its inception. Used as intended, it has no deleterious effects upon advocacy. But to illustrate what it is not: two weeks ago, I tried a case in a federal court. My libellant, a 40-year-old sea captain, was pronounced by the United States Marine Hospital as a traumatic epileptic. There was no question of the findings by electric encephalographic reports, by this independent institution of medicine, not retained or hired by plaintiff. Libellant was earning $1,100 a month at the time of the accident. He has a wife and four children, his special damages up to the time of the trial were over $20,000. He will never be able to go to sea again. He will not be free from convulsive seizures. A ventilator plate cover had fallen upon his head in Trinidad, Port of Spain, and in their own report filed with their own underwriters, defendants had acknowledged that the cause of the accident was the negligent securing of the cover by a longshoreman. Under the cases in the circuit in which this case was tried, a longshoreman's negligence is imputable to the owner of the vessel and, of course, an officer is a "sailor" within the meaning of the Jones Act. He does not assume to be responsible for his fellow servants' negligence.

During the course of the trial, the defendant offered $75,000 in settlement. There had been no pre-trial conference nor settlement conference and the trial judge *et mero motu,* during the course of the trial, said, "We'll pre-try this *after* the evidence is in"!

At this trial judge's request, *after* the evidence had closed, counsel for the respective parties, gathered in the judge's chambers and, by consent of both counsel, I advised the court of the offer of $75,000, and of my demand of $95,000 contingent upon an additional offer of shore-side employment. The trial judge thereupon gratuitously commented that the case was "a very close one." Counsel for defendant thereupon reduced his offer to $65,000.

The case proceeded to argument. I placed upon the blackboard a formula for the jury's use showing actual loss of wages, life expectancy, what libellant would have earned had he not had the epilepsy and indicated a figure of $500,000 which reduced to present value, with all exigencies and deductions, came to $300,000. The important point is that I showed the formula in the opening argument and fully discussed the damages of this most responsible and seriously injured plaintiff (he had been number one in a competitive examination of 4,000 Filipinos for their National Nautical School and led his class for four years. His record with his steamship company was outstanding).

On his instructions to the jury, the trial judge began by stating, "Ladies and gentlemen of the jury, this is not a 'giveaway court' or a 'share the wealth program.' The figures put on the board by counsel are fantastic and utterly unreasonable"!

On the question of liability, continued the judge to the jury: "You may have considerable difficulty in determining liability as this is a close case."

There were other parts of the charge to which I, as graciously and as respectfully as I could, took exception. But I submit to you respectfully and without transgressing your hospitality or my specific part in this program that it is such procedures which do violence to advocacy.

This same federal judge had been so rude to the independent medical expert retained by the United States Marine Hospital and whom I called, a diplomate in psychiatry, a diplomate in neurology, and also a diplomate in electroencephalography, that I apologized, most embarrassed, to the doctor afterwards.

I enjoy, even revere, a "rugged personality" upon the bench, state or federal. I consider myself a person of rather individual tastes. But I also know, I hope, when my individualism is about to turn to outright bad manner, to uncalled for arbitrariness. Such deliberate attempts to avoid advocacy drive us from our federal courts even though we know there is only one such judge in an entire district who so judiciously assassinates plaintiff's causes.

I mention the above procedure to you because if there is, in pre-trial, any authority for such comments, or for such judicial conduct, then I would want it vehemently and emphatically known that I do not subscribe to pre-trial, that I do believe it would be the termination of advocacy, that it would be the destruction of everything we must today so zealously guard while making haste slowly to modernize our trial practices for the consideration of him who is, most important, our client.

LAW VS. MEDICINE

Sometimes I become discouraged with my practice of the law. I chose between medicine and law. Though you might not believe me after listening to me cross-examine some doctor, I come from a family of doctors. My grandmother was the first woman druggist in California.

Daily, as we read our newspapers, do we see of new feats of science, of medicine. This disease has been conquered, that new surgical procedure has healed the innermost viscera of man. This new wonder drug not only heals the body, but tranquilizes the mind as well. Surgical devices one can see and feel, alleviate suffering. The results are tangible, are visible. There was sickness, the modern doctor has come, now there is health.

In his test tubes, the modern man of medicine has gone to and perhaps even beyond the frontiers. Sometimes we think he may have gone too far. But what he is doing is readily visible for all to see, no academic results here.

How with the law? We still deal in *words,* in *abstractions.* We still have our pleadings and we still maintain our now claimed most inadequate and unscientific jury. In defense, we say, its virtue is in its lack of expertness, its lack of science.

We argue that there must be a part of man not material and we point to the minister and the priest. We urge the philosopher's studies and even the astronomer's as being practical.

But the layman is not satisfied, and some of that contagion of *impatience* has contaminated us as lawyers and judges. "Let us have procedures that get results one can see," we exclaim. "Let us junk the old and try the new: we can always go back; why not experiment ahead; only human beings and their rights are involved, only the Constitution prevents us"!

I see the two professions sharply diverging: medicine may not be a science and, indeed, in the malpractice case it's called "an inexact science," but law—law certainly cannot even make claim of being a "science." We cannot categorize man's conduct. Our standard bearer, the "ordinarily prudent person," is as chameleonic as is one individual from another. On occasion, he is a child. At other times, he is an adult blind person. He may even be an intoxicated man, a woman of virtue, he may be a doctor, a scientist. We cannot deposit a coin in a clerk's office and assure a client with an identical injury, identical liability, identical judge and identical advocate that he will get the identical justice. We cannot weigh our judicial commodities on the apothecary's scales.

Perhaps the very difference between the professions, though they both deal in human nature, is that one deals with ascertainable commodities —temperature, pain, sickness, if you will, the other with the intangibles —happiness, sorrow, desire, greed, jealousy, avarice, ambition, the mixtures in any lawsuit. This is the key to the solution we seek.

We ultimately in the law deal with a human being, an individual. He is not to be categorized, labelled and placed neatly upon a shelf, *i.e.*, *you* are negligent, 10%; *you* are contributorily negligent, 5%; *you* have last clear chance, 80%; *you* have assumption of risk, 2½%. We realize that some of our reforms, so-called, are better suited for a "science" or something "mechanical" rather than one as individual as the human being, his personality, his individuality.

We cannot completely do to law what is being done to modern medicine, even with pre-trials, the impartial medical examiner, legislating lawyers' fees, extra sessions and extra judges, working through the summer.

I have but to tell you the story of a settlement to illustrate that human nature is, and always will be, part of a lawsuit—and a lawsuit is an attempt in retrospect to evaluate and perhaps compensate for an act of past life. The late Jim Landy of Portland, Oregon, told me of a client for whom he had negotiated what he felt was an excellent settlement offer of $10,000 against his complaint prayer of $20,000. Jim reported the $10,000 offer to his client. But his client was indignant. Said he, "I had a dream last night and the Lord appeared and told me to hold out for $20,000"! So Jim could do nothing but reluctantly proceed to trial. He did, and suffered the embarrassment that sometimes comes to all of us for trying too hard. The jury returned a verdict for $18,000, $8,000 above defendant's offer!

Jim somewhat sheepishly, but with joy, pumped his client's arm with the congratulatory, "We were certainly lucky." Responded the client with dead-pan face, "Lucky nothing. You cost me $2,000. If you hadn't doubted Him, we'd have gotten the whole $20,000"!

Some years ago, a plaintiff personal injury lawyer tried his case, if possible, in the state court and to a jury purposely selected by him with two thoughts in mind: 1) least intelligent, 2) least economic standing.

That has changed. The modern trial lawyer prefers federal to the state court, first because the dignity and solemnity of the federal court lends itself to a more realistic award in the personal injury case. Secondly, in keeping with this, the modern trial lawyer deliberately selects on his jury some bankers, some insurance men, some executives, but definitely people of intelligence and financial understanding. His theory:

if my case is sound in law and in damages, then I need an intelligent jury that appreciates the value of the dollar to give me an award consonant with the damages. He further reasons, "A person having no money and less intelligence serving as a juror might return a 'sympathy' verdict for my client, but knowledge of economic values and law might require a $200,000 verdict as compared with the sympathy of a $50,000 verdict which the other juror thought he would bring back as a favor to me"!

Another reason, of course, why the modern trial lawyer seeks the forum of the federal courts is the federal rules of discovery. These truly are the greatest boon to modern advocacy. They enable the modern advocate to ferret out the facts rather than to guess at them on trial. They enable one to "*count* the horse's teeth" rather than guess at them as did the ancients in argument.

In one sense, pre-trial is an extension of the *discovery procedures* that prevent the lawsuit from being a game of chance.

Conclusion

Thus, I urge that adequate pre-trial can accord in search of the adequate award, an adequate judgment. I urge that adequate pre-trial can do much to restore the true art of advocacy without the necessity of technical encumbrances that have caused laymen to disregard the law in favor of other judgments and to disrespect the art of the advocate. Further, I urge that little pre-trial is worse than no pre-trial, and that adequate pre-trial can help toward restoring respect to the lawyer and his law by giving speedy justice with unclogged calendars.

But further would I suggest that which has not been considered here at all today, or on the agenda, to my knowledge, that we go all the way in our pre-trials, and like the Englishman, have "pre-appeals" as well. Our client is not satisfied with the explanation that of his six years' delay from trauma to payment of the adequate award, only three are in the trial court, and these three years may be shortened by adequate pre-trial. He asks: "How about those other three years?"—the sitting out of the appeal. "I don't care what you call it, a hungry year is a hungry year to me, and my family, whether the delay is in the appellate court or the trial court. I cannot take dignity of a case on appeal as credit to the corner grocery."

The Englishman with his speedy trial immediately determines upon a speedy appeal, by having a procedure which preliminarily determines whether the case is an appealable one, and this is accomplished within weeks after judgment upon the verdict. I have sat in the Royal Courts

to hear the appellate judges go over fifteen or twenty cases on "the right to appeal" in a single day. Those appeals brought for delay and solely for the purpose of bringing plaintiff to his knees are summarily disposed of. I suggest and urge the consideration of such a pre-appeal procedure along with our pre-trial procedure, fully to restore the faith of our client in adequate justice that is timely returned.

But a warning from Blackstone about all precipitous legal reforms and I shall be done. Though written years ago, it speaks of current legal problems:

> . . . the liberties of England cannot but subsist so long as this palladium [jury trial] remains sacred and inviolate; not only from all open attacks [which none will be so hardy as to make], but also from all secret machinations, which sap and undermine it; by introducing new and arbitrary methods of trial; by justices of the peace, commissioners of the revenue, and courts of conscience. And however convenient these may appear at first [as doubtless all arbitrary powers, well executed, are the most convenient], yet let it be again remembered, that delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.