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PITFALLS IN TRIAL PRACTICE

HARRY O. CHAMBERLIN

This is a subject entirely too comprehensive for a one track mind like mine, even to scratch. But I have some impressions gleaned from a rather close contact with the trial practice in the Marion Circuit Court for the last six years. Of these observations, I shall recount a few which are presented to you—not in criticism—but purely as constructive suggestions. And in that connection let me say that constructive criticism hurts no one—not even a judge. So firmly am I of that opinion that long ago I gave instructions to my little, but I think efficient court room organization to appraise me of all complaints or criticisms made by any lawyer or litigant in connection with any phase of the court's conduct of the business before it. Naturally I have received some criticism in this indirect way, and some of them have been helpful. The fact a suggestion may have been made even in criticism is none the less valuable if it is constructive and I do not hesitate to say that some of these I have adopted and found that my critic was right.

A judge with vision and fairness must accept them in that light. And I do not even attempt to modify, much less to strike down, the inherent and inalienable right of every lawyer to damn the Court whenever it will help him out with his clients.

I am assuming that if I am able to radiate from this subject any interest at all it will be confined to actual trial work in the court room. To attempt a discussion of the written portion of trial work would be too exhaustive and too tedious for the subject of pleading is nothing if not dry.

The most notable pitfall of actual trial practice may I think be generally characterized as lack of preparation. It is not unusual for me to hear a lawyer say, "I haven't talked to this witness and I really don't know what he will say, but I'd like to propound just a few questions to him anyway." And scarcely a week passes during the trial of cases, that the Court is not prompted to say, after counsel is surprised by some declaration of the witness, or some lack of knowledge which he has shown, "Well, Mr. So and So, you could easily have ascertained the state of this witness' mind by talking to him and finding out what he knew." The answer to that is, of course, don't put a witness on the stand till you have both examined and cross-examined him, if his testimony is the least bit important. This particularly applies to the client himself and the more important of the

other witnesses. In short a case should be tried in the lawyer's office, so far as possible, before it is tried in the court room.

Every question likely to arise during the trial of a case, not purely elementary, should be fortified with authorities. And this doesn't mean the waving aside of the question by simply stating, "Why, your honor, the Supreme and Appellate Courts have decided that question many, many times and I can produce innumerable authorities to sustain me," because courts now a days have a habit of giving to such confident lawyers right then and there the opportunity to find just one of those innumerable authorities, and very often he doesn't succeed in finding even the one.

Not infrequently does a lawyer whose cause has been damaged or possibly dented a little by some truthful appearing witness, vehemently enquires "Who have you been talking to about this case?" In itself a perfectly proper and pertinent question. If the witness is unaccustomed to giving testimony in court and is the least bit timid he will usually say—"Nobody"—having a dreaded consciousness that because he has not kept locked within his own breast the facts he had told, he must have committed some grievous error akin to a crime. It is frequently then developed from him, with almost apologies and as though a confessional, that he had talked with both the lawyer and the litigant in the case.

In a trial before the Court this means nothing and detracts nothing from the witness' otherwise established credibility. But with a jury this veracity then frequently becomes seriously impaired and an energetic lawyer will generally take advantage of that impairment. In my own court, whether technically justified or not, if the situation seems to warrant it, I frequently, on the Court's own motion, advise the witness before he has answered opposing counsel's question, that his right is to talk with anybody concerning his testimony, so long as he tells the truth on the witness stand. And this, then, often brings forth the truth instead of incipient perjury. The answer to this is that a timid or backward witness if called upon to testify to important facts should always be advised as to his rights in that respect.

You all at some time or another have heard an over zealous cross examiner, who after having elicited some seemingly absurd or extravagant or contradictory statement of fact from a hostile witness, proceeds to rectify for the opposition all the damage done to the credibility of the witness and to the merits of his side of the case, by asking him for an explanation of his incon-

sistency. In nearly every instance the witness harmonizes his apparent contradiction or clarifies his exaggeration. Thus counsel instead of taking full and vigorous advantage in argument of what seemed to be the witness' fatal weakness where there is no comeback to haunt him gambles too much with fate in his zeal to make good better, or bad worse and ever after has a regret. The motto there should be "Let well enough alone," and "Know when to stop." And then a witness manifestly trying to be fair and tell the truth should not be cross-examined on inconsequential matters, simply for the purpose of confusing him, for even if counsel succeed a jury—and oftimes the court himself, is lead into a sort of sympathetic relation with the witness which leaves an impression of him more favorable than otherwise.

Another phase of the pitfall of lack of preparation which applies particularly to the younger and more inexperienced lawyer is I think either a too great reliance upon his own ability—which in moderation is always to be encouraged—or an over sensitiveness in the admission that he needs help. To the younger and less experienced lawyer I would say that if you don't understand all phases of your case whether in pleading or in presentation consult a brother lawyer. Don't hesitate at a division of your fee, if it makes more probable the winning of a meritorious case.

I am reminded of an incident in the Circuit Court where shortly after I took the bench early in the morning session there had been shown in the presentation of a matter a palpable omission of preparation. I gave the attorney till noon to find out his mistake as I thought fatal and cautioned him to be prepared by that time to proceed properly. He remonstrated mildly when I declined to point out the remedy for the fatal defect in his theory and how to cure it, upon the ground that it wasn't quite fair to his opponent to have both the opposition and the Court against him in the preparation of the case, whereupon the aggrieved lawyer said, "Why, your honor, Judge Ewbank has always pointed out these things to me when he saw I was on the wrong track and has indicated to me what should be done." To this I replied that Judge Ewbank had both the ability and the disposition to conduct a law school and I had neither.

On the other hand there may be such a thing as over preparation. Or to state it more accurately untimely preparation. I refer particularly to the situation frequently created, when one party is ready for trial and the other is not. If, in good faith and with apparent justification, either party asks for a continuance, and a consent to such will in no wise jeopardize or impair

the rights of the other side, consent to it should be given without an invocation of the Court's discretionary power to decide the matter, unless of course the Court has already reached the conclusion that the case should be disposed of. Few and far between are the lawyers who at some time during their careers do not find invaluable a reciprocal attitude in such matters.

This brings to my mind an incident occurring in the Federal Court some years ago where one of Judge Baltzell's eminent predecessors played the leading role. A certain defendant living in Indiana had unfortunately endorsed for a friend, and under rather peculiar circumstances, a note, which had found its way into the hands of parties living in another state. Suit was brought against the surety living here and though service was had, no appearance was entered. A trial date was set and the defendant appeared in person asking for a continuance upon the ground that he had not retained an attorney, having believed that he could reorganize his finances and settle the matter by the time the case was called for trial. Plaintiff's attorney was insistent upon a hearing for the day set and advanced the very appropriate reasons of a preparation for trial and the added expense incident to a postponement. The judge asked a few questions and listened patiently to the plea for immediate trial. He then said to the attorney something like this: "Mr. Attorney, the defendant may have been somewhat negligent in not preparing his defense and having counsel to represent him in anticipation of a trial today, and if you are insisting upon a trial now, we will proceed. The defendant, however, is entitled to some representation and the Court will assume to take that part. But before we start into the trial I think it only fair to tell you that I had a similar situation presented to me one day last week where one party forced another into a trial without a lawyer, and WE beat him." Needless to say the case was passed by agreement of the parties.

There is, of course, a well defined line of demarcation between earnest and legitimate preparation of witnesses and over zealous suggestion to them sometimes characterized as coaching. Frequently a lawyer believes so strongly in the merits and equity of his case that he is apt to expect too much of his witnesses. He must be careful not to transgress upon the illegitimate field of coaching for that sometimes is disclosed either by the demeanor of the witness himself or by a close cross-examination, and when that becomes apparent not only is the credibility of the witness destroyed, but the case itself is materially weakened. It

becomes another instance of the enevitable psychological effect which comes after the morale or good faith of the case has been successfully attacked.

The most neglected factor in the preparation of a case, is, from my observation, the Indiana Statutes. The annotated volumes of these laws should, in my opinion, be the Indiana lawyers' legal bible. Scarcely, if ever, is a case filed, in which either prosecuting or defending becomes the burden, that a careful examination of these laws and annotations relating to the pertinent matter in hand will not be of material help. I can safely say that I never open and read a volume of Burns that I do not get something new out of it. It seems to me with its annotations a miniature library in itself. No subject, I feel, should be investigated without a full and thorough examination of the statutes in an effort to find something that may parallel or effect your own situation. It is said of former U. S. Attorney Wm. H. H. Miller that in all his extensive practice, he never rendered an opinion upon any subject not involving a Federal question without first exhausting the subject in the State Statutes.

Of course the more preparation the more work for the preparer and work at best is onerous. There are some gifted souls who delight in work and that is their recreation. But to the most of us ordinary mortals, it is a pressing but necessary evil. I sometimes feel that those who lay greatest stress upon their happiness in work confuse their labor with results or anticipated results and it is in that that they are happy. It was Lord Eldon who once said in answer to a question as to how to become great in the practice of the law, "Live like a hermit and work like a horse."

Wm. Wirt, an American lawyer and a peer of the very best, once said: "Take it for granted, there is no excellence without great labor. No mere aspirations for emminence, however ardent, will do the business. Wishing and sighing and imagining and dreaming of greatness will never make one great."

Divorce cases, while perhaps the most important of all to the litigants themselves, do not as a rule appeal to lawyers as involving very weighty or intricate questions of law or proof. But that is scarcely a justification for the fact that not more than one attorney in three in the many hundred such uncontested cases I have heard, lay the proper basis for jurisdiction in these cases, without the help of the deputy prosecutor or the Court. The statute is plain, but yet so many lawyers seem to think that the term "property" is exclusive and is synonymous with the term real estate, or that the two years' residence require-

ment dates from the time of trial, or that the term "resident freeholder of Indiana" is universal in its application and may extend from San Francisco to Singapore, instead of having the definite and specific geographical limitations, which the term itself indicates.

Many seem to be unfamiliar with the rule that an offer to prove must precede the ruling of the Court on objection and that a failure of the record to disclose this arrangement gives a basis for disregarding the offer entirely. And notwithstanding this I am of the opinion that the rule is based as much upon absurdity as it is upon sound reasoning. But nevertheless it is the rule which must guide counsel and the Court in making up the record, until such time, if at all, as the Supreme Court may change its viewpoint.

There is sometimes shown in trial work a decided ignorance of good English and frequently a careless disregard for grammatical construction. They create pitfalls that jurors often notice and unfavorably comment upon. Just how much bad effect a lawyer's lack of education or carelessness in his English may have upon his case is difficult to say. It is well known, however, and quite the natural thing, that the laymen generally and especially jurors look for a high standard of English among lawyers. Their weapons and their tool is their thought and their theory—the only conduct for which must necessarily be their English. When then, they expose themselves by a constant violation of the most elementary rules of good English and proper grammatical construction, the least that can be said is that their causes are not materially aided.

With our tendency toward a democracy in this country there seems to be a growing disposition to translate friendliness and frankness into frivolity, at times when seriousness should prevail. This is sometimes made apparent in the court room. Whenever it is, it gets dangerously close to the charge of insincerity and I know of no more effectual way to lose a law suit than to surround a case with an atmosphere of pretense.

A trial judge frequently has to save a lawyer or his client against himself. In the ardor of his partisanship he is apt to overstate his own or understate his adversary's position. He too often sees only the current advantage of a present decision or verdict. The courts adverse ruling to him on pleading, or in the offering of evidence is frequently his salvation on appeal after he has been successful in the lower court and obtained perhaps a very respectable decision or verdict. In many instances had the trial court sustained any one of his several objections

or overruled any one of the several objections made by his adversary to evidence offered by him, it would be complete error which neither opposing counsel nor a court of review would overlook.

And it might be well for the trial lawyer in such a situation, instead of concluding that the Court is against him by reason of its adverse rulings to take consolation in the fact that he hasn't this or that error to haunt him and jeopardize his verdict on appeal. He might also remember that as a rule juries, and sometimes trial judges are not technical, but that courts of review are. If you have the least doubt about the latter ask any trial court who has ever been reversed.

A good thing to avoid in the trial of a case is a peevish temper both with opposing counsel and his witnesses. Do not approach a trial with the conviction that some or all of the opposition witnesses are perjurers and that your own client and his witnesses are upright and honest. I have never yet seen the case where I felt that one side had a monopoly on the truth.

It is not my intention that these few little observations should degenerate into a too critical recital, but I am prompted to call attention to some omissions which though not at all fatal in themselves, might lead at least to embarrassment. You would be surprised to know the number of pleadings and even original complaints that come to the courts hands unsigned and often when necessary, unverified. This indicates, if anything, too much dependence upon a clerk or stenographer. Any paper or pleading filed in court should have a final close scrutiny by the attorney handling the matter in his office.

While the dignity of the bar should be maintained and under all circumstances, the habit of caviling at the decision of the court and arguing the case after the judge has announced his decision is harmful and should be avoided, unless of course counsel has a good faith belief that the court has entirely misunderstood the theory which has been presented and even then it might be more appropriate to postpone further discussion till the argument on a motion for new trial is had.

There frequently is manifested a tendency to unnecessarily prolong the presentation of evidence through repetitions from the same witness. This consumes time and often tries the patience of both the court and opposing counsel. Needless conclusions are many times sought to be elicited—for example—just a few days ago a wife in a divorce case had testified that her husband, during a period of seven years past and from a time two weeks after they were married, had assaulted her almost daily;

had given her black eyes dozens of times; had kicked her downstairs and injured her spine several times; that he came home drunk two or three times every week; that he had never given her any money to spend upon herself or the children; that he habitually swore at them all and addressed vile epithets to her in the presence of others; that by his indolence he had caused them to be put out on the street a number of times; that he took from her much of the money which she by her own efforts had earned to assist in the support of the family and used it upon other women and in the purchase of whiskey; that he never remained at home in the evenings and never in all their married life had he taken her to a single place of amusement. At the conclusion of this vivid and emphatic recital of about all the wrongs a man could commit upon his wife and all those known to the category of physical cruel treatment, counsel for the wife asked: "Now tell the Court whether during your entire married life the defendant has been a kind and considerate husband to you or otherwise."

I do not contend that all the pitfalls are those that confront the lawyer engaged in trial work, and I have mentioned but a few of them.

There are pitfalls for judges as well as for practicing lawyers. Being entirely human we have—I hope, sympathy, religious creed, politics, friends, a natural desire for rest and recreation and many other attributes—be they good or bad—that cannot in our mental and physical construction be entirely eliminated from our system. The natural and constant reaction while on the bench must be to reduce all those things to a nullity. If we fail as to any of them or others as well, we render wrongs instead of justice.

And, too, I deem it wholly outside the function of the trial judge to lecture either litigants or lawyers, unless of course the occasion clearly justifies something in the nature of a rebuke for misconduct, or for a palpable violation of the proprieties of the situation. There has, I think, grown up among some otherwise excellent trial judges of the present day, a tendency to add to the judgment of the sentence imposed, another sentence of criticism at times ripening into positive abuse. I have nowhere found in any statute, federal or state, any warrant for that procedure. The law provides its own judgments and punishments. When the Court protected as he is from all physical and verbal reactions seeks to orally chastise some litigant or criminal defendant from the bench, it savors to me just a little of cowardice, and I wonder sometimes, if entirely shorn of that

protection, whether he wouldn't suddenly become converted to a mild mannered pacifist, merely making the pronouncements which the law justifies.

And I am likewise impressed with the belief that not the least important element which goes to make up a satisfactory judge, is his willingness to be a good listener and to listen patiently.

It seems to me that in the State Courts, at least, his real function is to talk as little as possible and in that way put into practical effect the admonition that he gives to his juries, to form no conclusion as to the merits of the case till the cause is finally submitted for his consideration. It was Lord Bacon who very appropriately said in this connection: "An over speaking judge is not a well tuned symbal." This theory, however, is not in the least inconsistent with the duty of the Court to at all times retain absolute control of the proceedings in the court room, and at any time to prevent a diversion from the pertinent issues to be considered or to prevent what seemingly would be a miscarriage of justice. Neither should it preclude the Court from announcing in some detail an analysis of his reasoning in reaching his conclusions where the matters considered have been close questions and counsel wish to learn the viewpoint of the judge. And I think one of the most dangerous pitfalls for a judge is the ever present tendency of false pride in a dislike—easily converted into a set determination—to change or modify a ruling or finding when shown to be in error. I do not make this a confession, but as an abstract tenet which may apply whenever the facts justify. No judge anywhere is too big or too capable to correct a mistaken opinion. Personally I have schooled myself to receive with genuine favor, any exposition of the law which may give to me a different or more intelligent viewpoint and then to act strictly in accordance with my enlightened vision and let the wounded pride, if any, take comfort in the knowledge that I am at least nearer right than I was before. And, too, I think I speak the sentiment of every judge in my acquaintance in announcing the foregoing as the true mental attitude which should prevail upon every bench.

To me there are three principal elements that are essential to the making of a professionally successful judge. These are ability, honesty and courage. None of us has a monopoly on anyone of those attributes, to say nothing of all of them. But I am impressed with the fact that in this age of intensive and sometimes hectic law practice, ability and honesty, important and necessary as they are, are worth but little to a man upon the bench if he fails to supplement them with courage.

The fundamental basis for the need and the operation of courts and the practice in them has been the same for centuries. In the sixteenth century St. Germaine, the notable writer, said, in addressing those learned in the law: "As a light is set in a lantern, that all that is in the house may be seen thereby; so Almighty God hath set conscience in the midst of every reasonable soul, as a light whereby he may derive and know what he ought to do. Wherefor as much as it behooves thee to be occupied in such things as pertain to the law, it is necessary that thou ever hold a pure and clean conscience. And I counsel thee that thou love that which is good, and fly that which is evil, that thou do to another as thou wouldst should be done to thee; and that thou do nothing to others that thou wouldst not should be done to thee; that thou do nothing against truth; that thou live peaceably with thy neighbor; that thou do justice to every man, as much as in thee is, and also that in every general rule of the law thou do observe and keep equity. And if thou do thus, I trust the lantern, that is thy conscience shall never be extincted."

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