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Some Problems Confronting Counsel in Defense of Automobile Negligence Cases

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SOME PROBLEMS CONFRONTING COUNSEL IN DEFENSE OF AUTOMOBILE NEGLIGENCE CASES

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The topic under consideration is concerned with the art or practice side of the lawyer's endeavors. It involves a study of the behavior of judges, jurors and of other lawyers with whom our daily work requires us to deal, as well as a consideration of more or less definite principles of law applied to the varying circumstances encountered in the trial of civil causes of action. Trial tactics, like strategy in other pursuits, in the final analysis, depends very largely upon the application of common sense to a given situation.

I

Problems Relating to Information Reaching the Jury Implying Insurance Coverage

"It is the aim of the law to afford litigants an impartial tribunal and a fair trial."

Vega v. Evans (Ohio), 191 N.E. 757.

Another court in discussing some phases of the problem under consideration declares:

"One of the most manifest and pressing duties, not only of courts, but of lawyers, is to prevent influences of this kind," —evidence that the defendant carries liability insurance— "from finding their way into the administration of justice. In the discharge of this duty the entire commonwealth is deeply concerned, for the use in evidence and argument of such influences produces injustice and waste of the time and labor of courts and juries at great public cost."

Horsford v. Carolina Glass Co., 75 S. E. 533.

1. *Whether Defense Counsel Should Admit Insurance Coverage.*

One of the earliest problems to be encountered, and one of great importance in conducting a trial is whether defense

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counsel at the outset of the trial should admit in the presence of the jury that the defendant carried liability insurance. Experienced trial lawyers are not agreed upon any definite course to be pursued as a general rule. A recent survey conducted among Indiana defense lawyers on the question, develops three different theories: one class of lawyers says it always tell the jury at the earliest opportunity that there is an insurance carrier involved; another class advises that it should never be known to the jury, if possible to prevent it; and a third group takes the view that the circumstances of each particular case should determine the procedure.

Some insurance carriers in some sections of the country give broad and general instructions to their defense counsel to admit at the outset of the trial that an insurance carrier is conducting the trial of the case.

The judge of one of the courts of Marion County recently stated that from his observance and experience, juries drawn from Marion County, sitting in his court, were greatly influenced by information showing or implying that the defendant carried a policy of liability insurance. He recalled that a certain case had been tried recently in which in the earlier stages of the trial there had not been any reference to insurance. It seemed likely that there would be no recovery, but upon a somewhat incidental reference to insurance, the aspect of the case changed very materially and the jury returned a verdict for a substantial amount. It is the positive view of this judge that reference to insurance almost invariably assures the return of a verdict in favor of the plaintiff.

Even though it may be a fact from common knowledge that indemnity insurance is now very generally carried by persons owning and operating automobiles, nevertheless the conclusion does not necessarily follow that every jury will disregard all harmful inferences in that respect.

It must, therefore, be conceded that there is difficulty in reaching any definite rule to be followed invariably, because of the impossibility of evaluating the unappreciated (and perhaps unconscious) influence of prejudicial matter on the mind of the jury.

2. *Misconduct of Counsel*

Misconduct of counsel may arise in the voir dire ex-

amination of the jurors, admission of improper evidence, or in the argument or statements of counsel in the presence of the jury. The improper attempt to impress the jury with the fact that the defendant carries some form of insurance protection, has given rise to a practice that is frequently very seriously abused; and presents problems that are appropriate for the consideration of this Indiana State Bar Association.

(a) *Voir Dire Examination of Jurors*

It is the general rule in the majority of courts that, so long as counsel acts in good faith, for the purpose of ascertaining the qualifications of jurors, and not for the purpose of informing them that an insurance company is back of the defendant, he has the right to interrogate prospective jurors with respect to their interest in or possible connection with indemnity insurance companies.

But even where it is considered proper to bring in reference to an insurance carrier, counsel ought not to transcend proper limitations in making an examination of the jury. If his principal purpose is to get before the jury the fact that the defendant is insured, and this is evidenced by persistent, improper conduct, a reversal of the case is required if there is a verdict for plaintiff upon a proper presentation of the question on appeal.

Martin v. Lilly, 188 Ind. 139.

Counsel sometimes employ various methods improperly to project insurance into the foreground. In a leading case in Indiana during the examination of the jurors, counsel for the plaintiff offered to put the defendant himself on the witness stand and to show that he had indemnity insurance on his automobile in the sum of $5,000.00 They also offered to prove that defandant's counsel were not employed by the defendant, but were employed by an insurance company, and further offered to have one of the defendant's counsel sworn and put on the witness stand to testify on that subject. All of this was done over the objection of appellant's counsel, and in spite of their request to the court that such offers be not made in the presence of the jury.

Martin v. Lilly, 188 Ind. 139.

It is an easy matter during examination of jurors to plant in their minds prejudicial matter. As stated in one of our Indiana Appellate Court decisions:

"* * * This can be done very adroitly or very crudely, depending upon the personality of the examiner. * * *"

Marmon Motor Car Co.. v. Schafer, 93 Ind. App. 588, 590.

By singling out a particular insurance company, rather that qualifying the jurors by asking whether they are interested in or connected with any corporation, or even with any insurance company, plaintiff's counsel is likely to lead the jury to draw the inference that the defendant is insured by a designated insurance company.

Martin v. Lilly, 188 Ind. 139;
Evansville Gas Co. v. Robertson, 55 Ind. App. 353.

A proper method of examination of prospective jurors is a comparatively easy matter. In a leading case in Indiana the court says:

"* * * Usually in these inquiries counsel are careful not to disclose their purpose. If they were as careful in cases where there is an indemnity insurance contract, they could find out whether any juror was interested either directly or indirectly in any indemnity company without disclosing to the jury that such company has an interest in the litigation. * * *"

Martin v. Lilly, 188 Ind. 139, 145 (6).

The Appellate Court has stated the proper course of procedure in the following language:

"The object of examination on the voir dire is to disclose to the examiner what the prospective juror thinks, does, or is, and his reaction to certain matters. The object of such an examination is not to plant in the juror's mind prejudicial matter. * * *"

Marmon Motor Car Co., v. Schafer, 93 Ind. App. 588, 590.

(b) *Admission of Incompetent Evidence*

Subject to well-known proper exceptions and qualifications, evidence that the defendant in an action to recover for personal injuries carries liability insurance protecting him from liability to third persons on account of his own negligence is not admissable.

Taggart v. Keebler, 198 Ind. 633.

Such evidence is inadmissable because it is irrelevant; the fact that the defendant carries liability insurance is not relevant to the question of his liability. Testimony of this character is extremely prejudicial, for it suggests to the

jurors that the insurance company is the real defendant and will have to pay the judgment. Ordinarily the only purpose in introducing such evidence can be to impress that fact on the minds of the jury, with the view of inciting prejudice against the defendant.

Such evidence has the manifest and strong tendency to carry the jury away from the real issue, and to lead them to regard carelessly the legal rights of the defendant, on the ground that someone else will have to pay the verdict. No circumstance is more surely calculated to cause a jury to return a verdict against a defendant, without regard to the sufficiency of the evidence, than proof that the person against whom such verdict is sought is amply protected by insurance.

(c) *Argument or Statements of Counsel*

Arguments and statements of counsel may be prejudicial and harmful for the reason that they refer to matters not shown in evidence or for the reason that the argument or statements are appeals to sympathy, passion or prejudice of the jurors.

In one reported decision counsel stated in argument that the suit was for only $5,000.00, "for reasons which we are not permitted to explain, and we do not even want a button off defendant's vest." This statement was held prejudicial as injecting the false issue of insurance in the case.

Ingerick v. Mess, 63 Fed. (2d) 233.

In a certain comparatively recent case in Indiana, it appears that while counsel for plaintiff was examining a witness, a question was asked concerning an "insurance plate"; and that counsel for defendant at once interposed an objection to the question, and then, addressing the court, said: "What has that to do with this case?" Whereupon the attorney for plaintiff said, addressing opposing counsel, in the presence and hearing of the jury:

"You know what it has to do with it. You know who employed you to defend this case."

The Appellate Court in its opinion passing on that case uses this language:

"These remarks were highly improper; they were entirely uncalled for; they could only tend to bring reproach upon the members of the bar, and discredit upon the in-

dividual member thereof, who would be so far forgetful of his high calling, as a sworn officer of the court, whose highest aim should be 'to assist in the due administration of justice' as to indulge in such so-called sharp practice. Such conduct always merits a severe rebuke by the trial court. * * *"

Norris v. West, 78 Ind. App. 391, 394 (3-4).

In a recent decision by the Appellate Court the attorney for plaintiff made the following statement to the jury during his argument:

"I don't see how they (referring to appellant's attorneys) are paid, whether by per cent on the amount they save the defendant or by his insurance company." Counsel further stated to the jury during the argument that "they (appellant's attorneys) are very solicitious about the dollars of the defendant or his insurance company."

Flamion v. Dawes, 91 Ind. App. 394, 399 (4).

Such statements by counsel can not be justified as legitimate argument.

Frequently the misconduct of counsel in argument consists of appeal to sympathy, passion and prejudice.

"Arguments and comments by counsel calculated to arouse the passions and prejudices of a jury by presenting to them considerations extraneous to the evidence are highly improper."

64 C. J., page 276, Sec. 294.

3. *What Constitutes Prejudicial Error*

The question of what constitutes prejudicial error presents difficulties with which every trial lawyer is familiar. The statement of general rules concerning prejudice may not be difficult; but their practical application many times is the source of great difficulty. Many courts have taken the position that the prejudicial effect of an attempt improperly to inject into the trial of a case, by evidence, statements, or arguments, matters from which the jury might infer that the defendant was insured against liability constitutes prejudicial error. Evidence that the defendant is insured or that the defense is being conducted by an insurance company, is not only incompetent, but so dangerous and prejudicial as to require a reversal.

Taggart v. Keebler, 198 Ind. 633.

In determining what constitutes prejudicial error, an

important consideration is: Was the misconduct calculated improperly to influence or prejudice the jury against the defendant?

In the case of the examination of the jurors on their voir dire, the Indiana courts have frequently suggested the good faith of counsel as the proper test to be applied. In one of the decisions by the Supreme Court of Indiana the court says:

"* * * Many questions may be asked and considerable latitude may be and should be allowed to enable a party to a law suit to find out whether a juror has any interest, business associations, social opinions, preconceived notions, experiences or prejudices that will affect him as a juror in the particular case. Usually in these inquiries counsel are careful not to disclose their purpose. If they were as careful in cases where there is an indemnity insurance contract, they could find out whether any juror was interested either directly or indirectly in any indemnity company without disclosing to the jurors that such company has an interest in the litigation. *Good faith marks the boundary line.* * * *"

Martin v. Lilly, 188 Ind. 139, 145.

Bad faith on the part of counsel in the examination of jurors may appear by persistence in asking improper questions of the prospective jurors, or by repeated efforts of plaintiff's counsel by argument or remarks to get before the jury the fact that an insurance company is defending the case. The phrase, "persistent efforts," is not to be limited in its meaning to repeated efforts; the substance of the rule is that the plaintiff in damage suits shall not, with intent to influence the judgment of the jury, convey a suspicion or surmise by direction or indirection that the defendant holds a policy of insurance which will protect him from loss in case a verdict is rendered against him.

Another mark of prejudicial error is the fact that the question, or statement of counsel was intended and tended to prejudice the jury against the defendant. In a certain decision by the Supreme Court of this state it was held that an objection to a question propounded to prospective juror on the ground "that it was intended and tended to prejudice the jurors" was a valid objection and should have been sustained by the lower court.

Martin v. Lilly, 188 Ind. 139.

An earlier decision of the Supreme Court in passing on

improper argument which was intended to prejudice the minds of the jury, says in condemnation of the misconduct of counsel:

"The declarations were improper and well calculated to produce the 'intended' prejudice against the defendant and its cause of defense."

School Town v. Shaw, 100 Ind. 268, 272.

The prejudicial effect of persistent efforts to get before a jury the fact that defendant carried liability insurance has been discussed in a very recent case by the Appellate Court of Indiana. The court in its opinion says:

"* * * One can not read the record in this case without noting the repeated efforts to get evidence before the jury of the fact that appellant carried insurance against injury to its customers. That question was not an issue in the case. Whether or not such insurance was carried by the appellant could not in the slightest manner effect the question of appellant's negligence charged in the complaint. Persistent efforts in this field of evidence which tend only to confuse and possibly prejudice the jury are usually regarded as prejudicial, requiring a reversal."

J. C. Penney, Inc. v. Kellermeyer, 19 N. E. (2d) 882, 886.

Where misconduct consists of statements outside the record intended and which tended to prejudice the jury, there is a presumption that such misconduct constitutes prejudicial error.

Nelson v. Welch, 115 Ind. 270.

And the burden is on the person guilty of misconduct to show that the contending party was not injured.

Perry Stone Co. v. Wilson, 160 Ind. 435, 440.

(a) *Is Such Error Curable by Instructions?*

Assuming there has been prejudicial misconduct, the question arises, what is the procedure to accomplish a substantial curative effect? There are instances, so some of the courts hold, where the sustaining of an objection removes some of the harm. Many courts hold that whether the court should go further than that is a matter within its discretion. However, it will appear upon careful analysis, that there are cases where mere instructions or admonition will not remove the harm. The following statement taken

from 64 Corpus Juris, p. 295, Sec, 312, is a concise statement of the proposition:

"The misconduct of counsel may be such that its effect cannot be overcome, and conduct so prejudicial that the verdict of the jury must have been influenced thereby is not cured by an admonition to the jury."

An early decision in Indiana passes on the question in a case in which the bill of exceptions showed that during the closing argument to the jury counsel for the plaintiff used language which was not within the issues, was wholly foreign and irrelevant, and which was intended to prejudice the minds of the jury against the cause of the defendant and which language was wholly unbecoming. The court in its opinion says:

" * * * We think that it is shown that plaintiff's counsel was guilty of misconduct in the trial of the cause; and when he persisted in making such remarks after objection from opposing counsel, and being warned by the court to desist, he was guilty of gross misconduct. * * *

"The attempt of the court afterwards, in its instructions, to remove all erroneous impressions that may have been created upon the minds of the jury by such declarations by plaintiff's attorney, came too late; whatever impressions may have been made by such declarations already had a lodgement in the minds of the jury, and we cannot say that if made they would be entirely removed by instructions from the court. The declarations were improper and were calculated to produce the 'intended' prejudice against the defendant and its cause of defense."

School Town of Rochester v. Shaw,
100 Ind. 268, 272 (1884).

In a more recent Indiana decision, the Supreme Court had before it a case in which evidence repeatedly had been admitted by witnesses who stated that the defendant had said, "I am heavily insured."

The trial court in that case gave an instruction attempting to limit the application of the evidence. The opinion of the Supreme Court then goes on to say:

"Instead of curing the error in admitting evidence that the defendant had said he was heavily insured, this instruction aggravated whatever damage had been done to defendant's case by the admission of that evidence. * * * "

Taggart v. Keebler, 198 Ind. 633, 638.

The Supreme Court of Indiana in another decision of comparatively recent date had this precise question before it. The question arose on alleged error in interrogating the jurors on their voir dire examination, and upon the offer to put the defendant on the stand to show that he had indemnity insurance on his automobile and that counsel appearing for him were not employed by the defendant but by an insurance company. The court in that case says:

"It is insisted in the instant case that this error of misconduct was cured by an instruction. It is true that erroneous and extraneous matters sometimes get into a law suit through the zeal of counsel, and, if checked at once by the trial court and the jury is instructed, this may be cured; *but one party may not be permitted to get the other into a dying condition and then expect the court to revive him by instructions.*

"The misconduct of counsel was not cured by instructions in this case."

Martin v. Lilly, 188 Ind. 139, 146.

4. *Method of Saving Record for Preservation of Error on Appeal*

(a) *Necessity for Objection*

Whenever misconduct occurs, as when plaintiff's counsel makes statements outside the record or makes improper appeals to sympathy, passion or prejudice of the jury or otherwise transgresses proper decorum, a question of policy immediately arises whether an objection should be made to such misconduct.

Some courts readily recognize the difficulties under which defense counsel labor in such circumstances. In a recent case in a District Court of the United States, plaintiff's counsel in final argument stated to the jury: "They (the defendant and its counsel) haven't a defense in the world except that they have spent a lot of money for experts to try to humbug you." And then in another part of his argument, counsel said: "Gentlemen, just imagine these doctors standing at the autopsy, why they stood there like a bunch of sharks ready to seize on —." When the case reached the Circuit Court of Appeals some question was raised as to the sufficiency of the record to present the question of misconduct. The court said:

"It is clear, that, if possible, there should be some prac-

tical rule with respect to saving exceptions to improper remarks of counsel made in argument to a jury. * * * The Appellate Courts are not bound to recognize as exclusive the rule that counsel may only object and except at the time the improper argument is in progress, and are free to adopt any rule which is fair to litigants, fair to their counsel and fair to the trial judge. * * * The party who has been injured by an improper argument ought not to be precluded from securing a review, where his counsel has failed to interrupt the argument of opposing counsel, believing it would injure his client's case to do so. * * * To interrupt the argument of opposing counsel is often a hazardous thing to do. It may create more prejudice than it removes. It leads to controversies between counsel, which interfere with the orderly conduct of the trial. Jurors do not ordinarily know the difference between proper and improper argument. They easily obtain the impression that objecting counsel is unfair and is trying to keep them from hearing something of consequence. * * *"

London Guarantee & Accident Co. v. Woelfle,
83 Fed. (2d) 325, 343.

The Supreme Court of the United States has held that misconduct of counsel may be of such flagrant character the trial court of its own motion should have intervened, aid failing to do so, the court on appeal will grant appropriate relief, notwithstanding the absence of objection or exception. In that particular case there had been misconduct during the closing argument to the jury. The court says:

"Respondents urge that the objections were not sufficiently specific to justify a reversal. But a trial in court is never, as respondents in their brief argue this one was, 'purely a private controversy * * * of no importance to the public.' The state, whose interest it is the duty of the court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice. * * * Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this court from correcting the error."

New York Central R. Co. v. Johnson,
279 U.S. 310, 318, 73 L. Ed. 706, 710.

(b) *The Rule in Indiana*

The rule in Indiana requires an appropriate objection or motion. The court must be asked to take some specific action upon objection or motion. Under the rules recently adopted by the Supreme Court of Indiana, the record need not show exceptions to adverse actions, orders or rulings of the Court. If counsel believes the injury is of such character that it can not be repaired by instruction or admonition, he should move the court to set aside the submission of the cause and to discharge the jury.

Counsel, in the exercise of prudent caution, will examine the authorities as preparation for the task for saving the record. Where the error occurs during the examination of prospective jurors on their voir dire, there must be an approrpiate objection or motion. There must be a special bill of exceptions, and it is deemed the safer practice in most instances to bring the entire examination of the jury, the objections, motions, and rulings into the record.[1] A copy of such bill of exceptions will be included in the record on appeal.

Mitchell v. Beissenherz, (1922), 192 Ind. 587, 591;
Rhodes v. State, (1930), 202 Ind. 159.

The motion for new trial must present the question and allege misconduct on the part of counsel or allege irregularity in the proceedings. Where there has been improper statements or arguments of counsel the record must show the objection or motion of the objecting party. Where the harm is deemed to be irreparable there should be a motion to set aside the submission of the cause and discharge the panel, with appropriate showing in a special bill of exceptions, copy of which is to be made part of the record on appeal.

Where steps are to be taken for a mistrial on account

[1]When evidence is conflicting as to the competency of a juror, the entire examination of the juror and all the evidence on the subject, must be brought into the record by a bill of exceptions.
Townsend v. State (1897), 147 Ind. 624, 636;
Indianapolis, etc. R. Co. v. Pitzer (1897), 109 Ind. 179, 189;
Douthitt v. State (1896), 144 Ind. 397.
Unless the record contains the entire voir dire examination of the jurors, the action of the trial court, in some instances, will not be reviewed.
Annadoll v. Union Cement, etc. Co. (1908), 42 Ind. App. 264, 266;
Goff v. Kokomo Brass Works (1909), 43 Ind. App. 643, 644, 645;
Johnson v. Holliday (1881), 79 Ind. 151, 155.

of misconduct of counsel, the Appellate Court in a recent opinion has stated:

"The rule of procedure and steps necessary to be taken by a litigant who is aggrieved by the misconduct of opposing counsel, were properly stated in the case of Ramseyer, Exr. v. Dennis, (1918), 187 Ind. 420, 439 (23)."

See Pennsylvania Ice & Coal Co. v. Elischer, 106 Ind. App. 613, 618.

Some additional authorities to consult are:

Maybin v. Webster, 8 Ind. App. 547, 552;
United States Cement Co. v. Cooper, 172 Ind. 599, 614;
Vandalia Coal Co. v. Price, 178 Ind. 546, 557;
Taggart v. Keebler, 198 Ind. 633, 640;
Annadall v. Union Cement Co., 42 Ind. App. 264;
Inland Steel Co. v. Gillespie, 181 Ind. 633, 645;
J. C. Penney, Inc. v. Kellermeyer, 19 N.E. (2d) 882, 886.

It may be suggested that a mistrial should not be allowed because of the delay thereby resulting in the litigation. Courts have expressed very definite views concerning this subject:

" * * * When counsel so far forget themselves, and the dignity of their profession as to travel outside of the evidence and the record in the case, in argument to the jury, and wantonly and virulently attack the character of the opposing party and witnesses, attempt to browbeat opposing counsel, and disregard the orders of the court, they ought not to complain if a new trial be granted on account of their misconduct. * * * "

School Town v. Shaw, 100 Ind. 268,273.

The Supreme Court of one of our Central States has said:

" * * * We regret that clients must suffer for the overzealousness of counsel, but if the courts are to retain the respect of the people they must restrain counsel from going beyond the limits of fair argument. In a democracy like ours the impartial administration of justice is essential to the preservation of liberty. * * * Too often if justice is not thought to be impartial foul means are resorted to. Hence

it is vital to our welfare that general respect for the fairness of juries as well as of judges be maintained. * * * "

Krenik v. Westerman, (Minn.), (1937), 275 N.W. 849, 851.

The Circuit Court of Appeals, through Sanborn, Circuit Judge, says:

" * * * The truth is that when a lawyer departs from the path of legitimate argument, he does so at his own peril and that of his client, and if his argument is both improper and prejudicial, then he has destroyed any favorable verdict that his client may obtain, unless, in some way, his error has been cured prior to the submission of the case to the jury."

London Guarantee & Accident Co. v. Woelfle, (1936), 83 Fed. (2d) 326, 343.

5. *Suggested Remedial Procedure*

Courts frankly recognize the existence of an evil growing out of misconduct of counsel which results in prejudicial harm. They are not always in accord as to the procedure to be followed or the discipline to be administered. In a reported decision from the Supreme Court of one of the Central States it appears that during the course of the trial plaintiff's counsel was guilty of the following misconduct: He asked one of the plaintiff's witnesses whether late at night any of the tribe of detectives of the Street Car Company happned out to take her statement. One of the physicians called by defendant's counsel, on cross-examination, testified that he worked for compensation insurance companies and thereupon plaintiff's counsel made the statement:

"You are paid by the people who are interested in having the person painted with iodine and marked for duty and sent back?"

And to another physician he remarked in the presence of the jury:

"So you have now joined the ranks of the elite."

The court in passing upon the error assigned says:

" * * * We consider that we can not properly pass the matter with mere criticism, as this court has often passed like matters in the past. The court should not only say something about it, but should do something about it. All that has heretofore been said in condemnation and admoni-

tion has had little, if any, effect towards stopping such misconduct."

Hanley v. Milwaukee Elec. Ry. Co.
(Wis.), (1935), 263 N.W. 638.

On the voir dire examination of jurors it has been suggested that the trial judge himself make the appropriate inquiry of the prospective jurors as to whether they are stockholders, officers, agents or employees of any insurance company.

In the decision of a certain case in Ohio the court says:

"If counsel for plaintiff, acting in good faith, is led to a belief or even a serious apprehension that there may be such a conflicting interest in some prospective juror, or jurors, there is a way for him to protect his client's interest without prejudicing the interests of defendant. * * * Counsel might very well state his apprehension to the presiding judge and ask the judge to conduct the examination of the jurors on their voir dire. The judge upon proper showing of cause, could conduct examination of the jurors on this point after first stating that he has no knowledge whether or not the defendant is insured, and that they must assume that he is not insured. Or if the counsel conduct the examination, he should * * * do it by questions of a general and impartial nature * * * without the prejudicial suggestion that an insurance company is involved in the case, and such questioning must not go beyond the extent necessary to insure a fair and impartial jury in view of the circumstances of the case and the parties to the litigation."

Vega v. Evans, 191 N.E. 757.

The view taken by the Ohio courts has been expressed in a recent decision in the following language:

"A sound public economy and the administration of justice requires a strict adherence to the issues between the primary parties without regard to the existence of any indemnity contrart. * * * The injection of the insurance company into the case by innuendo creates the assumption on the part of the jurors that the insurance company has been paid to indemnify the injured plaintiff for the loss, and that it is attempting to escape such liability. * * * The parties involved in the action for damages should be the same as the parties involved in the accident or injury. And a sound public policy requires the determination of the question of liability by reference to the issues between such parties only, without reference to their contracts with others."

Vega v. Evans, 191 N.E. 757.

In a recent decision by the Appellate Court, counsel during his argument to the jury, made the statement:

"The defendant is just like the plaintiff. He does not care if a judgment is rendered against him. He won't have to pay it."

The opinion of the court on that subject contains the following language:

"The making of improper statements by counsel in their arguments to juries can not be condemned too severely. Said statements of appellee's counsel were *clearly* improper, *but* we must recognize the fact that the trial court was in much better position to determine the effect of said statements, than this court is. Trial courts have a wide field of discretion as to motions to withdraw causes from juries because of such misconduct of counsel. We hold that the record does not show an abuse of such discretion here."

Coats v. Strawmeyer, (1939) 21 N.E. (2d) 433.

It is difficult to imagine a case where the jury could be given more clearly to understand that an insurance carrier was in the background and that the jury need not worry about the effect of a judgment against a defendant.

In another recent case where the argument was "outside the record" the court says:

"This court does not condone or approve remarks of counsel in arguments to juries which are 'outside the record', *but* we do not think it is reasonable to infer that the jury, which we must assume was composed of fair-minded citizens, was in any way influenced by such a remark after being instructed by the trial court to entirely disregard it. Therefore if said remark was 'outside the record' it was harmless error."

Indianapolis Railways v. Boyer, 26 N.E. (2d) 63, 68.

As a practical matter, plaintiff's lawyer will examine the authorities to see how far he can go, defendant's counsel will examine the authorities to see what protection his client may have, both sides looking to the decisions of the courts to ascertain their course of conduct. So long as courts merely criticize, counsel will feel free to indulge in misconduct and this added to personal interest assures in practice the further perpetration of a recognized growing evil. Whenever trial courts promptly declare mistrials for misconduct, counsel will then follow a discreet course and will refrain from attempting

the perpetration of error designedly for the purpose of harming a defendant and procuring a verdict.

The courts of Indiana in many instances show too much leniency toward misconduct of counsel in the particulars now under consideration. The rules recognized and announced by our courts, if applied more frequently, would tend to reduce misconduct to a minimum. A united effort on the part of both Bench and Bar would have a marked tendency to demonstrate to the public that each of us is endeavoring to live up to the ideal, expressed in one of our reported decisions, "of his high calling as a sworn officer of the court whose highest aim should be 'to assist in the due administration of justice.' "