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Presenting the Evidence

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PRESENTING THE EVIDENCE

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Presenting the evidence is the trial counsel's art of serving the triers of the facts the ponderous pre-trial investigation of the law and facts of the case in neat and digestible portions. The essential ingredients in a proper presentation are (1) order, (2) balance, (3) interest, and (4) ingenuity. If the trial advocate has planned and served the menu with these objectives in mind then he should accomplish the desired result of affecting the minds of his hearers favorably.

The presentation of evidence is dependent upon the testimony of witnesses and the production of documents. The treatment of witnesses involves an understanding of the psychology of human behavior. The introduction of documentary evidence involves a command of the rules of evidence underlying their reception. Accordingly, this paper is devoted to a discussion of the presentation of witnesses and documents before a judge or jury bearing in mind the four ingredients for successful advocacy.

There are various types of witnesses in the typical lawsuit. The most common witness is the "lay" witness. The lay witness may gain directly or indirectly from the outcome of the suit, in which event he is considered an "interested" witness. If he has nothing to gain from the suit then he is placed in the "disinterested" category. Finally, we have the specialists who are called to prove a specific part of the case and they are referred to as "expert witnesses".

Each witness serves a separate function in the proper presentation of evidence. One of the important tasks trial counsel undertakes before coming into the courtroom is to determine the order in which the witnesses will be called. The keynote in calling witnesses is the logical and orderly construction of the case designed to obtain and maintain the interest of the judge or jury in the case.

In a negligence case it is wise to open and close with strong witnesses. Normally, the plaintiff is his first witness. He is in a position to enlist the interest of the trier of the facts by narrating all the essential operative facts which make up his case. His testimony establishes the foundation for the medical expert testimony and lends itself to corroboration by succeeding lay witnesses. The last witness called by the plaintiff is the medical expert. His function

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is to describe the nature and extent of the injuries suffered by the plaintiff.

In a negligence case it is, of course, the defendant's primary thought to win his case on the issue of liability. When the plaintiff's medical expert has testified to injuries which the defendant questions (and this is not uncommon) then it is incumbent upon the defendant to focus upon this issue by first calling his medical expert, providing both the questions of liability and the medical are being contested. Where the plaintiff has misrepresented the nature and extent of his injuries the reasonableness of his story with regard to liability will be looked upon with disfavor by the jury. Such a sequence will dramatize to the judge or jury that the expert opinion given by the plaintiff's doctor is suspect. Thereafter, the defendant and his other lay witnesses may be used to contradict plaintiff's version of the accident.

The writer recently tried a case on behalf of the Pennsylvania Railroad under the Federal Employees Liability Act. The plaintiff claimed that he sustained as a result of the accident a very serious permanent injury to his back. The defendant railroad sharply contested the nature of the injury sustained by the plaintiff as well as the manner of the occurrence. After the plaintiff and his doctor testified, the defendant's doctor was called as the first witness on behalf of the railroad. The issue of the extent of the injury was brought into focus before the jury. The jury brought in a verdict for the defendant. When the jurors were questioned after the rendition of their verdict they commented that they were of the opinion that the plaintiff's injuries were sharply exaggerated and accordingly, having come to that conclusion they disbelieved his version of the manner of the happening of the accident.

The defendant's advocate should, therefore, develop through the presentation of the evidence as many issues as possible and especially those issues which may tend to impeach the good faith of the plaintiff's position. The development of manifold issues in a lawsuit has a further practical effect. It is common knowledge, among negligence lawyers, that the settlement value of a suit depends upon the number of contested issues. The more issues developed in a case the greater likelihood that the insurance carrier may settle the case at a reasonable figure and an amount less than that demanded by the plaintiff.

In order to obtain the favor of the trier of the facts, it is trial counsel's function to present his inquiry in such a manner that each witness feels at ease and tells his story completely. It is the job

of the advocate, long before the trial, to evaluate the witness, his dress, his manner, his intelligence, and his ability to express himself. The lawyer must use his knowledge of life, human nature, psychology and human emotions in deciding the proper line of inquiry to be used with the witness so that the jury will be impressed with his testimony.

Can the witness through his testimony persuade the jury? In this connection the trial lawyer will do well to remember that it is his duty to have the witness recapitulate that information which he obtained through his senses, primarily through his visual and auditory senses and less frequently through his olfactory and gustatory senses. To the ordinary observer a man is just a man. To the student of life and human beings, every pose and movement is a part of the personality and the man.

Assume the inquiry is: "Mr. Witness, will you please tell this Court and jury everything you saw while you were standing at the corner?". A persuasive witness being asked the above question and taking control of the situation is a gem. He may well win the case for you. Don't interrupt him. Let him tell his story. He probably knows it better than you. After asking the question, your job is to sit down. Let him take over. Don't try to help him. You know well that he needs no help. A skillful lawyer does not tire the jury or himself by asking needless questions of a witness who can tell his story naturally, directly, fully and in a manner calculated to effect the minds of his hearers favorably.

Of course the converse of this is true. Where you have a witness who has had no experience in a courtroom and is not able to tell his story well, your first job is to put such a witness at his ease. It might be wise to have the witness observe another trial in the courthouse so that he may be acquainted with the procedure of a trial. Counsel should then ask all of the essential questions of such witness so as to bring out the evidence clearly and in chronological order.

The advocate must control the testimony of this witness. He must not permit the witnesses' answers to effect his mental processes or the advocate's plan formulated in advance of trial to insure the complete projection of all testimony. Where the witness' response has gone beyond the scope of the question, the advocate must then direct his inquiry to those matters passed by witness in his answer.

To expedite the presentation of the case trial counsel will normally ask a few leading questions to identify the witness with the subject matter of the suit. The items covered in such preliminary interroga-

tion are dates, places and parties. The court and opposing counsel will have no objection to leading a witness at this stage of his testimony since it is harmless and is intended to save time in covering matters of detail. At the same time it has the salutary effect of relaxing the witness and orienting him to the subject matter in issue.

Having covered these preliminaries the witness should then be given an opportunity to narrate. The trier of the facts wants to know what the witness said or heard another say, or what the witness did or saw another do. At this point of the presentation the trial lawyer should ask a few simple, direct questions designed to elicit from the witness, in his own words, what he knows.

Simple questions are intelligible to the witness and the jury; complicated questions may be unintelligible to either. Such questions stimulate the witness to give a complete and uninterrupted account of his knowledge of the subject matter. The judge and jury will be more inclined to accept such responses as candid, truthful testimony.

While there is merit to leading a witness through preliminary detail, it is poor advocacy to continue leading the witness through the substance of his testimony. Such questions are bad in form and properly objectionable. If counsel persists in leading the witness the court may admonish him for it. Since leading questions suggest the answers desired from a witness, a jury will be less inclined to accept as accurate such testimony.

There are occasions where trial counsel must ask leading questions either because of the nature of the witness or the nature of his responses. If a witness is very old, very young or infirm, counsel may be compelled to resort to leading questions. There are unfortunately times when a witness forgets, and his recollection must be refreshed by leading questions. These, however, are the exceptions. The rule is: "Don't lead!".

Lay witnesses are called to testify as to facts within their knowledge. Generally, they are not qualified to express opinions or draw conclusions. The trier of the facts has the exclusive role of drawing conclusions based upon the evidence. Questions designed to elicit opinions or conclusions are objectionable, and should be avoided.

Interruption and repetition are two characteristic vices in direct testimony. It must be remembered that the objective of trial counsel is to maintain the interest of his hearers in his case. Questions which lead to objections and debate interrupt the orderly presentation and distract the jurors from the trend of the evidence. Repetitive questions, or questions which repeat the witnesses' answers, serve no

useful purpose, and run the risk of boring the trier of the facts.

A witness plays his part in the drama of the courtroom when he tells everything he knows about the case. Oftentimes, counsel, inebriated with the success of a favorable witness, decides to explore foreign fields for further success. In doing so, he sometimes finds he has destroyed the credibility of his own witness.

If your witness saw the accident and testifies that the plaintiff's motor vehicle was travelling in the wrong traffic lane, don't have him put marks on diagrams with which he is unfamiliar and which may be inconsistent with that of the defendant's. If he did not pay particular attention to the condition of the parties after the accident, don't run the risk of having him testify as to the consciousness of the plaintiff to disprove injury to the head.

Each witness discharges his duty to you and to the trier of the facts by giving a complete account of what he knows. His testimony becomes tainted when he is compelled to extend himself into matters which he doesn't know.

In conducting a direct examination counsel should not use the cross examination form or tone of voice. This vice is characterized by the lawyer who intends to make a point impressive and emphatic by the development of his witnesses' testimony through the cross examination form. Vehemence does not impress a jury. When you call a witness to the stand you are vouching for his honesty and his testimony. There is no excuse for using the cross examination form in the examination of your witness on direct.

The rule against the impeachment of one's own witness does not mean you cannot call other witnesses who will testify differently from the one who has just left the witness stand. There is no limitation of proving facts through other witnesses, which vary with the testimony of a prior witness.

In direct examination do not press your own witness too strongly. The witness has failed to perceive the meaning of the question you have put to him. His answer has no relation to the question put to him. The second answer to the same question shows he has not grasped the meaning of the question. Don't compliment the witness on his lack of intelligence by asking the witness the same question the third time.

You may be subjected to the same embarrassment as Mr. Henry W. Taft says he was, in the days of his inexperience. When, in a collision of a car float belonging to a corporation he represented, he examined a lookout on a float. He tried to get from the witness what his duties were.

> I pressed the witness by three or four questions without evoking what I sought, and finally, with a show of impatience, said: 'Well, what were you standing on the bow of the float for anyhow?'
>
> The answer came very readily: 'To be a witness for the complaint in case anything happened.'[1]

If you have a witness who may gain as a result of the suit or is related to one of the parties, it is wise to bring out this interest in your direct case. This will serve to disarm your opponent of part of his cross-examination. Furthermore, it will give the trier of the facts the impression that you intend to reveal the whole truth, even those facts which tend to be embarrassing.

There are occasions when counsel has at his disposal an abundance of witnesses. In this situation the guide is intelligent exclusion. Trial counsel should only employ his very best witnesses. The best witnesses are those who were in a position to know the facts and can relate them candidly and intelligently, and whose stories will stand up under cross-examination.

Should all witnesses to the same occurrence be used, the trial lawyer may find himself in the embarrassing position of having inherent contradictions between the versions of his own witnesses. One good witness is worth more than half a dozen poor ones. The advocate would be wise in concentrating upon and carefully selecting his own witnesses rather than worrying about his adversary's witnesses.

A proper direct case should bring home to the judge or jury that this is in fact the complete and accurate version of the dispute. Counsel will not attain this objective if he makes constant resort to prepared questions or outlines. If counsel has prepared his case properly then he should have a complete mental outline of his presentation. Written outlines give the jury the impression that the case is rehearsed and counsel has little command of it.

In recent times there has developed a liberality in the various states for permitting examinations of parties and witnesses before trial. In New York, for example, in a negligence case, either party may be examined before trial upon all the issues in the case. The question presents itself, to what extent should counsel read from these depositions in presenting his direct case?

Ordinarily, it is best to use your adversary's deposition for purposes of impeachment in cross-examination. However, there are in-

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stances where an adversary has exclusive knowledge of certain relevant testimony which will be necessary to make out a prima facie case. In such cases counsel must resort to reading into the record the necessary testimony to make out the prima facie case. Read only those portions which are essential to your case.

Documentary evidence must be treated with as much care as parol evidence. Before offering a document into evidence counsel must be certain that (1) it will serve the purpose for which it is intended and will not be seized upon by his adversary because of certain damaging admissions, and (2) a proper foundation has been established for its reception.

In certain situations counsel will be compelled to offer a document in evidence to make out a prima facie case. If the action is founded upon a written contract, all the antecedent negotiations and conversations may be incompetent under the Parol Evidence Rule. If the agreement is one which falls within the scope of the Statute of Frauds, the plaintiff will be obliged to offer a writing identifying the parties and the subject matter, in order to sustain an action on the contract.

There are other situations where documentary evidence acts as strong corroboration of the elements in one's case. Hospital records can be offered in evidence to show only medical care and treatment. The history contained in the records may be used to cross-examine the plaintiff on his version of the accident.

Before a document may be received in evidence, a proper foundation must be established for its reception. Like parol evidence, the document must be both relevant and material to the issues in the case. It also must be competent, which means that it is not subject to exclusion based upon the rules of evidence.

Certain documents must be identified by appropriate witnesses before they become competent. X-rays must be identified by the doctor who took them. A company's books must be identified by a witness and the entries made in the regular course of business. Without such foundation testimony, these documents are properly inadmissible.

There are however, other documents which are admissible based solely upon appropriate authentication and without the necessity of calling identifying witnesses. A certified copy of a judgment may be offered in evidence without calling the Clerk of the court; a certified death certificate or autopsy report is admissible without calling the appropriate clerk, doctor, pathologist or coroner. The authentication is tantamount to oral testimony identifying it.

In the presentation of the medical evidence it is essential that the jury know the medical background of the physician whose opinion is offered to persuade them to adopt the advocate's point of view. For that purpose the doctor should be asked to state what his experience and training has been, particularly in the specialty which is applicable to the medical issue in the case.

Many times you may call upon the services of an expert. If such a witness is called he may be a man of outstanding qualification. In that event trial counsel should not accept the offer of a concession of the qualifications of the witness. Such concession when made should be rejected, politely of course, with the statement that it is preferred that the jury hear what the doctor's qualifications really are. Such a recital adds weight to the expert's opinion.

The most commonly used expert in present day litigation is the medical expert. Except for those doctors who have actually treated the plaintiff, the typical medical expert is called upon to give an opinion based upon an assumed state of facts. This opinion is elicited from the expert by the use of a "hypothetical question".

The hypothetical question should contain those facts in the record which are absolutely necessary for the expert to render an opinion. All unnecessary details should be eliminated from the question. In connection with the form of the question, counsel should ask the expert to assume the following facts, all supported by the evidence, and then go on to relate the facts. It is cumbersome and trite to constantly intersperse before each sentence the word "assume".

Facts should not be incorporated in a hypothetical question which have not been established by other witnesses or documentary evidence. Similarly, if the court permits counsel to ask a hypothetical question based upon facts to be proven, it is essential that counsel connect the question with the record. If the premise upon which the expert renders an opinion is unsubstantiated, then the opinion is worthless.

It is unwise merely to obtain from the expert that, in his opinion based upon the evidence, the accident was or was not a competent and producing cause of the injury. Trial counsel should request the witness to state the reasons for his opinion. Such testimony will permit the trier of the facts to visualize the nature and extent of the injury and will permit the expert to substantiate his opinion with medical data, something he is qualified to do.

The advocate for the plaintiff in presenting the evidence must direct his attention to the compensible factors in a personal injury action. These are essentially:

1. Proof of the nature of the injuries sustained by the plaintiff and their effect upon the general health, bodily functions and nervous system of the plaintiff.

2. Proof of the causal connection between the accident and the resultant disability.

3. The duration and permanency of the injury.

4. The pain already suffered and likely to be thereafter suffered.

5. The expenses already incurred and likely to be incurred in the treatment and care of the injuries.

6. The loss of earnings and impairment of earning capacity.

The direct examination of the defendant's examining doctor differs in approach from that of the plaintiff's medical proof. The doctor's testimony will concern itself primarily with his findings and his appraisal of the plaintiff's disability as a result of the physical examination which he conducted.

Usually the defendant's advocate will hesitate to have his doctor testify, but he should not hesitate to do so, when the testimony will disclose and is directed towards the following objectives:

1. That the plaintiff's claim is based upon a medically untenable position.

2. That the claim is based upon invalid or improper assumptions.

3. That the complaints and disability are not justified by the traumatic effect of the injury on normal anatomy.

4. That certain injuries produce disability for certain periods but in the case at hand, greater claims are being made for the known periods of disability as agreed upon by the experts.

5. That the claims are exaggerations, not medically sound, and not substantiated by the recognized medical literature.

6. That there is no casual relationship between the accident and the injury or present disability.

In order to properly project these facts to the jury in an intelligible and clear fashion the defendant's advocate must have a knowledge of anatomy, pathology and physiology so that he might know, and by his line of inquiry impress the jury with what trauma can do against what trauma cannot do. That is, that trauma never caused this condition, or if trauma did cause it, that it is finished, cured and terminated and that this litigation is based on an improper hypothesis.

If the case is well prepared, and the evidence presented in an orderly, balanced manner, so that the judge or jury's interest is maintained throughout, trial counsel may pride himself in his accomplishment. There is one element that lurks in the background of a case

for which little can be written — the advocate's ingenuity. Things will crop up at trial which will come as a complete surprise and require spot decisions. When such predicaments occur it will take all the skill, sagacity and training of the trial lawyer to cope with them.