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OBSERVATIONS FROM A TRIAL BENCH†

By RALPH O. OLSON*

NO SUBJECT was assigned to me, and it is with temerity and humility that I approach any subject. Some of you are not yet members of the profession and so have not been privileged to appear in the trial court, as you will be when you are admitted to the Bar. Possibly you are having an adequacy of technical legal discussions and might find interesting some observations of a random nature reflecting upon the mutual problems of the trial court and members of the Bar. Of those of you who are experienced in these things, I beg your indulgence and your pardon if what I say is trite, for I shall refer to small things, little things principally, which are the problems of each of us, individually

They are of concern to us, I submit, because we must not overlook the fact so often commented on by leaders of the Bench and Bar that many causes of dissatisfaction with courts and lawyers arise from the conduct of individual judges and lawyers, or from situations which they, as individuals, can control or improve.

As members of a profession, we are the trustees, the keepers of its high traditions. Rooted deep in the past, with a long procession of great men as its patron saints, it is a tremendous and essential force in society

The profession, as such, has developed a conscience which we can clearly recognize, and to which we must be responsive. We perform

† An address delivered at the Law School Banquet, University of Washington, on April 18, 1947.

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our service to the public and maintain our ideals and standards as a group, mindful that, even though we could some times make more money in other ways, we must do nothing in any manner which will endanger our trust. We are confident that our professional standards and attitudes will be maintained because they are cultivated in the great law schools, such as this, and kept fresh by the example of our members.

The public expects us to continue to improve, and it deserves improvement from us because we are better equipped by training and education than many of our predecessors. We can submit as our joint effort, among other things, higher standards of legal education and admission to the Bar and the integration of the Bar. In the field of the administration of justice, our ultimate end, can it not be said that we are moving forward when we consider what has been done to provide new rules of civil and criminal procedure, including provision for pre-trial hearings, the organization and work of the judicial councils, the work of the American Law Institute, to mention only a few of our accomplishments?

While these great projects are being continued and expanded and we assist them as we are able, let us remember that there are the small things, too, that need our attention and which, properly attended, will do much to improve our individual and group standing.

Few lay people know, for example, of the great volumes of the Restatement of the Law, nor will they ever know of them, but they do know, or will come to know you and me. They can see us and observe us as we act toward their problems or take part in community affairs. So you and I are important factors in the establishment of the respect and honor of our colleagues and our institutions.

What, then, are some of the things we should do or not do to better keep the faith and also to better accomplish our main job, the search for justice?

Confining the present inquiry solely to facts observable from the trial bench, and, being a fisherman, an analogy once mentioned by John W. Davis appeals to me. He suggested that the pleasant talk of fishermen about fly casting, size and color of flies, merits of different rod makers, and all the other things fishermen so love to discuss would soon cease if the fish had the power of speech and would address himself to the best methods of approach under varying conditions. So lawyers who seek to capture the mind of a judicial tribunal might be interested

in some of the expressions of one who sees their problems from a vantage point in the depths of the pool, so to speak.

I, of course, cannot and do not attempt to speak for anyone other than myself, or for any other species, appellate or federal, but, speaking as one who has been caught and released to be caught again, I am convinced that care taken with the little things in court, as in fishing, is apt to stand one in good stead when the prize he seeks is in a taking mood. Some of these trifling details may tend to attract, and others may tend to repel. They may not make all the difference, but you may be assured they make enough difference to justify some attention.

We can agree, I think, that a lawyer appears in court to aid the court, to guide him, if you please, to the correct decision. We can further agree that a trial is a search for justice, and not a game of wits.

Our first concern in every case is a determination of the facts. Trials are commonly called lawsuits, but it often seems they might better be termed fact-suits. A great many cases turn upon the facts almost entirely, and actually may present no complicated questions of law. In any event, questions of law, simple or complex, cannot be considered until the facts are established.

Counsel must familiarize himself with the facts early in his employment and never lose that knowledge. Thoroughly explore the facts with your client and his witnesses. Insist they tell you the whole story and the true story. It will save you embarrassment and disappointment, and avoid surprises during the trial.

In law school, you usually deal with stated facts. In practice, the development of the facts in a way that makes them understandable to the tribunal is the special province of counsel. Good lawyers do this well.

You must assume, because in our system of jurisprudence it is true, that the tribunal knows nothing about the facts at the outset of the trial. The court assumes that you do know the facts, and is assisted by a clear and concise statement of what you expect to prove them to be. True, he usually has read the pleadings before the trial, but nothing is more helpful to an understanding of the issues than a well-prepared outline of the proof. It seems to connect the evidence and give direction to the case. It can be brief, but should be inclusive of all of the main points of the evidence. If argumentative, in tone or in content, it may be interrupted and lose much of its force.

Remember, too, this is the first thing the court or your clients usually see you do in the trial, except possibly the examination of jurors. We will consider it your first appearance in the case, your first cast into the stream, and have a look at you.

Did you get to court on time and have your client and witnesses there promptly? How are you dressed? Not because the court is interested in the latest styles, or cares about them, but because of the nature of your job, you should be mindful of your personal appearance. No one can be critical if your clothes are neat and clean, and someone might take exception to their being otherwise.

How are your manners? Are you tactful and considerate? You should be. You hope to persuade someone to your view of the case, and you are most apt to succeed if you appear to be a pleasant person. A grandiose manner is an affectation which seems to be *passee'* Give an appearance that your education has caused you to grow and not to swell, or you may tempt someone to reduce the swelling. Courts may be able to resist this temptation, but jurors seldom can.

A trial is not a game of concession, nor is it an alley fight. Counsel can be diligent in his client's behalf and decent, too.

The first impression of yourself and of your case now being made, you must call a witness. If you say to the court, as is sometimes done: "Your Honor, I have not had a chance to talk to this witness," may the Lord have mercy on your soul. This is hard to excuse. Of course, you should have talked to him, or why do you call him? How can you elicit facts from him if you don't know what he knows? You should go over the matter most carefully with every witness and, if unable to do so, the court will gladly give you time to do it. I repeat, you can't be too careful in your examination of each witness before trial. You must prepare. As they said in the medical school, "You can't crib at the bedside," so it is in court. If you haven't worked on your case and studied it before trial, you may find yourself unable to cope with situations against which you should have been forewarned.

As the examination proceeds, echoing quite often develops, that is, repeating the answer while trying to frame the next question. This only serves to double the record, to the possible distress of your client.

Somewhat similar is the conduct of the lawyer who can't hear a favorable answer and asks that it be repeated. It is surprising how well he usually can hear an unfavorable reply

We may also have a chance to see the interrupter in action. Sometimes he says he is trying to be helpful to the court and counsel, and he is, so much so that no one else can do anything. He may try to break the chain of argument or examination, overriding every one: This should not happen in a well-conducted trial, and if it happens to you, don't get excited. Take it easy, and if the court doesn't take care of it, ask him to do so. You should not have to fight to get a word in edgewise. If it should be inserted at all, it should be inserted broadside, and you will get an opportunity to be heard and to try your own case in your own way if you are patient and firm.

Bickering across the table between counsel is not helpful. It places the added burden on the court to maintain order and decorum, and it is more irritating than persuasive.

If you have exhibits for introduction in evidence, refer to them by their identification number or letter. Use this number or letter each time you mention the exhibit. Have points of reference on exhibits clearly identified for the record. I recall a case where a point on a map became the subject of inquiry. Counsel asked the witness if that point were anywhere "near that fly" which was then on the exhibit. By the time the witness and the court had looked at the exhibit, the fly had left without leaving even a speck. Counsel laughed, but never corrected the record, and that point remained in doubt, not only for the trial court but for the Supreme Court.

Witnesses may demonstrate by gestures to indicate small distances, spots or bruises, or other things. Clarify these for the record, as the Supreme Court must read the record and rely upon it.

Considering the subject of objections to the admission of evidence, we can agree that they are necessary, but are not to be abused. Be sure the rag is worth chewing. Too constant objection may imply a fear of letting the facts develop. If a line of questioning to which objection has been sustained continues, the court should clarify the situation, and probably will do so upon request. If there is no reason for the objection, don't object. If there is, give the reason. Remember, "I object," with nothing more, cannot be sustained.

You can help the tribunal, if you read from a document or book, by referring accurately to the page and volume. Be sure your citations are in point, and that the court has ruled as you state the ruling to be. I recall an instance where an argument arose over the admission of

evidence during the trial and the attorney who had been examining the witness was requested by his partner that he be permitted to argue the law on this point. It was his custom to read the entire decision whenever he cited a case, and he followed this practice in this instance. The more he read of this case, the better pleased his partner and his client seemed to be, because the decision was quite evidently in their favor. He continued the reading until he came to the conclusion, and with seeming emphasis, he read. "This is the law of Georgia, made so by a special statute. The great weight of authority is to the contrary"

The sequence in which you call your witnesses is important. Call them in logical order. Careful outline and preparation of your case will insure this.

It seems advisable to call a technical or expert witness after a recess, if possible, in the morning. The tribunal is more alert then and more apt to follow the witness.

Suppose, however, that it appears that the court or jury are becoming drowsy. You know the signs. What can be done about it? Dropping books, clearing your throat, stopping the proceedings, raising your voice don't seem to be effective. Your client is entitled to have the tribunal stay awake. My feeling is that you should not proceed until it is. Dozing is not widespread, but does happen, and it is embarrassing to sincere counsel, I am sure. Usually, too much lunch is the cause, although other causes less easy to eliminate do contribute their effects. You must remember that jurors are not in the habit of sitting still as long as they are required to do when taking part in a trial. Many of them are not accustomed to being inside. The air in the court room may become heavy. This combination of circumstances makes the juror's head nod no matter how hard he tries to prevent it. Why not request the court for a short recess? It is the only remedy I know that permits everyone to stretch and relax and return refreshed. It is usually easy to make this request, because it is customary to have a recess about mid afternoon anyway. Be tactful in the reason which you assign for your request and, even if it is denied, you will have alerted the tribunal.

Most courts are pressed for time, some more than others, and some less than they profess. In any event, the phrase, "save time," is heard repeatedly in court. It is used both as a shield and as a sword. That

is, its use sometimes indicates a sincere desire to proceed expeditiously and efficiently, but, on the other hand, its use occasionally is an excuse for skimming to hide poor preparation, or sometimes it is inserted to encourage an opponent to hurry to his detriment.

Quite often several minutes are spent leisurely on preliminary questions and the essential matters are covered in haste to save time. This is like spending an evening getting your fishing gear ready, forgetting to set the alarm and missing the fishing trip entirely.

The "time-conscious" lawyer may be one who doesn't have his case well in hand, at least not well enough to know what part merits time and what part does not.

It is true that leading questions save time, but, aside from preliminary inquiries, they should not be used. An intelligent listener gives less weight to answers elicited by leading questions than he does to those made to direct questions. You won't waste time if you are prepared and know what each witness is expected to prove.

When the court asks you how long your case will take for trial, he doesn't do so to limit you, but to permit him to arrange his calendar. Make your estimate as carefully as you can. You won't have to watch the clock or fear being cut off if you have studied your case and are going ahead directly and without wasted effort. When you obtain an assignment, remember you have a monopoly on that much time of the tribunal and its staff. You also have the time of your client and his witnesses, and that of your opponent, dependent upon your efficiency. Common courtesy as well as common sense requires you to make good use of this time. If you think the court or jury is becoming petulant, ask yourself if you are working. If you are and can see the reason, and good manners permit, suggest the cause to the court so that your client's case won't suffer because of possible impatience with you.

It seems advisable that court hours be short. Long hours can't be avoided on some occasions, but, as a usual thing, they are not good for court or counsel. We have to reckon with fatigue, and trial work is hard work. If you are prepared, you can do a lot in a short time. Another advantage of short hours is the elimination of the 4.30 in the afternoon and later period, when it has been determined more trial errors occur than during any other portion of the day. Tempers become short, flare-ups and heated arguments become more common late in the afternoon.

Just as we can agree that preparation is the greatest time saver, I think we can agree that it also tends to eliminate wandering around the court room by counsel during examination of witnesses. Possibly this is a nervous habit, but it is one to be avoided. It is diverting, because the court and jury are apt to watch counsel and not the witness. Also, quite often, questions are asked when counsel has his back to the witness and he has to repeat the question so it can be heard.

Of course, not all court rooms have good physical equipment. County managers would supply it if they knew how costly and inefficient poor court room arrangement can be. Make the best arrangement you can for yourself and your client. Maybe the tables can be moved to advantage for your case. Explain your reasons to the court and he will probably see that you are accommodated. Usually you will want your client near you inside the bar. Aside from a tactful recognition of his right to see and hear, because he may have to pay the costs, you may need to consult him. The amount of consultation necessary will depend upon his nature and your pre-trial work, but, in any event, conduct your consultations as quietly as possible and at a time when it will be least interrupting to the trial. Of course, you will not try, by means of loud whispers heard all over the court room, to convey an idea to the court or jury. This is a pretty shallow tactic and is seldom appreciated, nor is it very satisfying. It is something like buying fish at a market on the way home from an unsuccessful day on the stream.

These and other suggestions might be made to bring you to an expeditious resting of your case. This brief list is not a catalogue of all of the proprieties and improprieties, but is only an illustration of some of them.

Preparation is your key, and it continues to be your best ally, after you have rested your case and are confronted with the problem of cross examination of your opponent's witnesses. The more you know about his theory of the case and about his witnesses the better will be your cross examination.

Cross examination is one of the most important and useful tools of the skilled advocate and, properly done, can be most helpful to a tribunal. It is probable that no rule can be devised to fit every circumstance, but it appears certain that cross examination is more often overdone than underdone. Seemingly, many lawyers approach it with the same mental processes as does the man who orders a full meal

of many courses when he is not hungry, and then feels obliged to eat it all, even when he knows it isn't either necessary or good for him. I believe Francis Wellman, in his "Art of Cross Examination," illustrates this tendency by comparison to a man who drills an oil well and, after he strikes the body of oil, continues to drill and lets it all out through the bottom of the pool.

As in direct examination, but more important in cross examination, don't ask a question unless you have a good reason to do so. Common sense, a knowledge of human nature, and familiarity with your case can help you and point the limits. Let discretion be your guide.

These little things done and both sides having rested, you approach the final argument with confidence. You have done your best to make the facts clear and to impress the court with your sincerity and candor and knowledge of your case.

The whole subject of the argument is a large one. Time will not permit its inclusion in this discussion. Suffice it, for our purposes, to say that you have made a well-prepared, concise, clear statement of the facts and the applicable law—a statement which you made ready before trial, and finally checked during the recess prior to its delivery.

You are now finished with your work. What next? What can you expect from the court aside from the favorable decision for which you hope? And how well have you prepared him to give it? You have covered the fish; will he strike?

Put yourself in the place of the court. Assuming there is no jury, the judge is absolutely alone. Justice is best reached by the guidance of the court by counsel. The court can't ask anyone how to decide a case, and your last chance to guide him has passed with the close of your argument, unless, of course, you intend to do a thing I hope you will never attempt—a thing well illustrated by a story told of Judge Rudkin in his early days on the Superior Court. A lawyer who had been a friend for years was engaged in a warmly contested trial before the judge, and he thought he should go to the judge's office during the evening and talk to him about it. The judge listened patiently to a long harangue without comment and, when the lawyer exhausted himself, he asked the judge what he thought about it. Judge Rudkin said: "Well, you know, it is beginning to look as if those so and so's have us beat."

At the outset, you assumed the court knew none of the facts. Make

the same assumption regarding the law, especially if the applicable law in your case is outside of fields constantly before the court. You will be surprised how often this presumption may be indulged with safety. In fact, safety usually requires that you indulge it. It is your duty to do so.

You can best perform this duty by submitting your trial briefs before trial, particularly if you have complicated or unusual rules for application, either to the whole case or to admission of evidence. The court should be the best informed person in the proceeding on the law of the case. The more counsel help him, the easier it is for him. You would be surprised if you knew how much time trial judges spend before, during, and sometimes after trials in an effort to learn the law of the case. The idea that the judge just sits up there like a bump on a log is a fallacy. Judges, like lawyers, have to work to do their jobs well.

Also fallacious is the idea that justice can always be reached by a judge because of the knowledge he possesses. Some people believe that cats' eyes contain light which is visible at night and that the eyes of some animals, tigers and lions, for example, cast even more light than do those of cats. We know, of course, that this is not true, and that animals' eyes only reflect light, some more than others. So it is with judges. Some may reflect light, your work, better than others, but remember, if there is no light, there can be no reflection.

Help the court by your preparation, your manners, your candor. He will appreciate it. The decision can not always be in your favor, but if you have helped the court, the decision against you won't be so painful. It will probably be based on reasons understandable to you and to your client.

We should work to the end that, whenever possible, an oral decision can be rendered at the conclusion of the argument. I submit that this is a very healthy thing. A decision when the evidence is fresh is more apt to be just than is a delayed decision. This promptness would eliminate one of the most often heard and best justified criticisms of the administration of justice. We must admit that delay can mean the denial of justice.

From the court's standpoint, the rendering of his decision orally, when the lawyers and litigants are present, assures him that his reasons for his conclusions are known to the parties interested in the case.

From the standpoint of counsel, an outline of the court's views may present opportunities to be of further assistance to the court upon either the facts or the law, or both, at the time the formal judgment is submitted for entry

It has been suggested, too, that decisions in open court have an "above-the-board" complexion which is desirable. It is important to all of us that people get justice, but many legal writers contend that possibly it is even more important that they should be made to feel they are getting it.

We realize, of course, that it is natural for the losing litigant to be disappointed, or even angry on occasion. Recognizing this, we must do whatever we can to prevent this feeling from turning to one of distrust of the institutions of the law. Litigants must know that their case is decided upon reasons within the case itself, and not upon outside considerations of any kind.

I am sure that courts do not mind criticism. But one kind of criticism we really need, we do not get. There should be a clearing committee of the Bar, or some other impersonalized machinery for the constructive criticism of the courts for their improvement. We may develop poor habits, and acquire mannerisms which are not consistent with good judicial practice. If this should occur, it surely would be unintentional, and correction could be accomplished if the matter were discussed dispassionately. Perhaps, some day, steps will be taken in this direction for our ultimate benefit.

In these and many other ways, too numerous to mention, we can do our work better and, by mutual assistance and respect, increase our efficiency, that is, reach our goal of doing justice more accurately. As was said at the outset, they are small things, but attention to small things is necessary.

Not many lawyers can try only cases which are bound for the United States Supreme Court, or our own Supreme Court. The bulk of your work must necessarily be concerned with less involved problems. Just as your attention to these smaller problems, remembering their importance to your client, establishes your reputation, so is your reputation fortified by your attention to the small details of the trial, and you, yourself, and your profession strengthened.

You will not be through with examinations and grades when you leave the law school. Your work in the practice will be studied fully

by the community, by your clients, by your associates at the Bar, and by the courts, but most important will be the examination which you yourself give it. Set high standards and see that you meet them.

In conclusion, may I thank you for a pleasant evening. I have enjoyed being with you. We of the profession realize how fortunate we are to have a steady stream of young, well-trained and vigorous members coming into our ranks. We welcome you. We want to help you, and we need your help. We offer you what we have done thus far, not with apology but with the admission that much remains to be done.

Keep your ideals, your faith in American institutions, your habits of study and industry, and your enthusiasm. Keep clean and of excellent moral character.

Do the small things well and you will enjoy your profession and see the large affairs develop to your liking.

I leave you with the old traditional wish of fishermen—"good luck and tight lines."