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FOR PURE COURTROOM DRAMA, few things can equal the tense emotional excitement of a brilliant cross-examination—especially one that destroys a seemingly perfect case. Such scintillating displays do occur in the courtroom, sometimes—but only *sometimes.*

Unhappily for the *aficionados* of courtroom drama, such occurrences actually are very rare in fact. They happen far more often in movies, novels, and radio and television shows than they do in real life. But certainly there is a fascination in the idea of the rapier-wit of a debonair trial attorney flashing in lightning thrusts, in a dazzling display of penetrating cross-examination. The many books written about cross-examination testify eloquently to the keen interest of lawyers, as well as laymen, in this subject.[1]

In truth, however, far too much emphasis has been placed on cross-examination. This has happened because of the ready susceptibility of the subject of cross-examination to most colorful treatment, and its resultant exploitation by the media of radio, television and movies. Very rarely does a lawsuit actually turn on a brilliant cross-examination which results in the complete break-down of the opponent's case.

Far more usually cases are won or lost by dull, diligent preparation, and by proper presentation of *direct* examination. Cross-examination, of course, has its place in every lawsuit. But the plaintiff has a lot of bridges to cross, and many obstacles to overcome, before he can indulge in its luxuries.

In observing the younger lawyers in my own office over a period of years, I have found that unless they are properly imbued with the importance of direct examination, their tendency

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[1] See, for example: Wellman, Art of Cross-Examination (4th ed., 1936); Cutler, Successful Trial Tactics (1949); Ramanatha & Mathrubutham, Cross-Examination Principles & Precedents (1953); Soonavala, Advocacy (1953); Keeton, Trial Tactics & Methods (1954); Clark, Preparation of Cross-Examination (N. Y. P. L. I. series, 1948); Gallagher, Technique of Cross-Examination (N. Y. P. L. I. series, 1948).

is to minimize that phase of a case and to succumb to the mirage-like fascination and color of cross-examination.

The importance of proper, well-coordinated *direct examination* cannot be too strongly stressed. The plaintiff's objective in any civil lawsuit usually is to realize an adequate award by the jury. He can achieve this result only through the direct testimony of his own witnesses. The most important of these is the plaintiff himself.

Why concern ourselves with the histrionics of the much-belabored art of cross-examination, when actually it has only a minimal effect in the "selling" of the plaintiff's case to the jury, and when it can be used only *after* he has rested his case. First impressions are lasting. The jury will form its major and primary impressions regarding the plaintiff's case from the *direct* examination of the plaintiff himself, and then of his witnesses.

Effective direct examination of the plaintiff in a personal injury suit, for example, is the most difficult phase for the lawyer, and is one of the most important factors in the success of the lawsuit. As is true of all other phases of a lawsuit, a successful direct examination of the plaintiff does not just *happen.* A considerable portion of trial preparation should be devoted to the development of a direct examination which will "sell" the case to the jury, and the lawyer should recognize that he has a lot of "sales resistance" to overcome.

When the plaintiff takes the witness stand one often can sense the apathy of the jurors as they sit back to listen to the well-prepared story of the plaintiff and his counsel. A successful direct examination will soon convert this apathy to a sensitivity and communion of spirit between the plaintiff and the jurors. Once this intangible communion of spirit is established the case is well on its way to success. The more time spent with the plaintiff in trial preparation, therefore, the better will counsel get the "feel" of his client, understand him as a person, and "sell" his cause. The plaintiff is the product, and counsel cannot sell the product if he does not know it.

Preparation for direct examination should begin with the first interview of the plaintiff.[2] From this and subsequent inter-

[2] For interview techniques see, for example: Gair & Cutler, Negligence Cases: Winning Strategy (1957); Biskind, How to Prepare a Case for Trial (1954); Magarick, Successful Handling of Casualty Claims (1955); Oleck, Negligence Investigation Manual (1953); Spellman, How to Prove a Prima Facie Case (3rd ed., 1954); Osborn, The Problem of Proof (1946); Goldstein, Trial Technique (1935); 1 Schweitzer, Cyclopedia of Trial Practice (1954); 1 Belli, Modern Trials (1954).

views counsel will begin to fabricate the structure of his case and, depending upon the material gathered and utilized, will determine the size and strength of his structure as embodied in the petition.

The foundation of the plaintiff's direct examination will be the allegations in the petition, both as to the facts establishing negligence and the medical facts.[3] It is a serious blunder for a lawyer to allege what he cannot prove and it is equally serious to over-sue the case. Such errors can be devastating when the signed verification at the end of the petition is utilized as a weapon in the hands of a defense lawyer who knows how to use it well.

Unfortunately, there is a time lapse in excess of two years, in many courts, between the filing of most cases and their appearance on the trial list. Thus even the most carefully drafted petition needs a careful review before trial. The medical allegations need special consideration at this point. Injuries alleged as permanent may have healed, while injuries thought to have been minor may have developed serious complications.

The lawyer must anticipate the worst effects when the petition is filed, in order to properly protect his client.[4] If there are modifications to be made in the position as alleged in the petition, the plaintiff must be properly prepared to bring them out on direct examination. It is most important that, if there is to be a change from the position taken in the petition, the jury must be shown the reason for the deviation.[5] Further, the allegations must then be analyzed in relation to the testimony of other witnesses, both factual and medical.

It is not uncommon, for reasons already stated, for the plaintiff to have to deviate from his petition in certain respects. Such deviations must be lucidly justified, if he is not to be impeached by his own witnesses, by reason of facts and circumstances which have developed or become known since the filing of the petition. It is apparent then that a conscientious and honest explanation of any deviation, on direct examination, by the plaintiff, will effectively avoid the dilemma of being discredited by his own witnesses, or by his own treating physician on the one hand, or of being sharply attacked by defense counsel as having

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[3] See such works as Oleck, Negligence Forms of Pleading (1957 revision); Gardner's Bates Ohio Civil Practice (1957 revision); Weiner & Miner, Ohio Methods of Practice (1957).

[4] 16 Ohio Jur. 2d 298 et seq.

[5] A substantial deviation, if permitted by the court, may result in a continuance of the case. 11 Ohio Jur. 2d 172.

sworn to a lie, on the other. If this situation is properly anticipated and prepared for, subsequent witnesses should corroborate and strengthen the plaintiff's case, and any attempt by opposing counsel to capitalize on the deviation will be ineffectual.

At some time between the filing of the petition and the trial of the matter the plaintiff will most likely be subjected to a discovery deposition.[6] This document usually consists of from thirty to fifty transcribed pages, and may encompass the entire personal life of the plaintiff, as well as every conceivable aspect of the facts of the accident and the injuries and treatment which followed.[7]

For example, in an automobile accident case there will be a multitude of questions relating to distance, speed, time, static conditions, and other such factors, about which the plaintiff will have given his "best estimate," although the accident itself was probably over in a matter of a few seconds at most. One can readily recognize that such a report may be replete with discrepancies when compared with the petition or with the testimony as offered at trial. Obviously the trial lawyer should have a verbatim copy of the discovery deposition, in order to adequately prepare the plaintiff for sincere and effective disposition of these discrepancies on direct examination.

The plaintiff will undoubtedly be questioned on deposition about prior accidents, injuries, illnesses, and hospitalizations, and about subsequent injuries. These are all matters of record, and are probably known to defense counsel beforehand. Do not permit the testimony of your plaintiff to be harmfully damaged by his inadvertent misrepresentation of any of these matters on his deposition, and the subsequent confrontation with the records in court.

In preparing the plaintiff for his direct examination, he must be made to understand the importance of full and forthright disclosure of these matters. If there has been an omission or a variance in the deposition, this must be candidly admitted on direct examination, with a good and sufficient explanation. Otherwise the impeaching records will be devastating—particularly as to prior claims or lawsuits.

The plaintiff ordinarily should, on direct examination, generally conform to his testimony as stated on deposition. This

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[6] Ohio R. C., Sec. 2317.07.

[7] For typical forms of demands and bills of particulars, etc., see the works cited above at n. 3.

means, of course, that the plaintiff will have to be thoroughly familiar with his prior statements. By all means have him read them several times, and encourage him to ask any questions arising in his mind about them. If deviations are necessary, either because the plaintiff was in error on his deposition, or because of changes in the facts and circumstances, prepare him to admit the deviations on direct. Let the jury know that prior testimony is being changed, and why. Remember that, with your plaintiff in the courtroom, the only use which can be made of his deposition is to impeach him for a prior inconsistent statement,[8] and that proper preparation of the plaintiff can all but eliminate this ever-present hazard.

The statement, either signed or stenographic, given by the plaintiff soon after the accident, without benefit of counsel, can be used in either form, with a proper foundation, for the purpose of impeachment.[9] In the federal courts, such a statement can be obtained under the Federal Rules of Civil Procedure.[10] If, therefore, the case is in a federal court, the trial lawyer can obtain a copy of the statement through proper procedures. Once obtained, it should be given the same consideration and treatment in trial preparation as is given to a deposition. Deviate as little as possible, and explain any necessary deviations on direct examination. In the state courts, on the other hand, such statements are privileged.[11] If at all possible, the plaintiff's lawyer should try to obtain a copy in exchange for something of value to the defense, such as copies of medical reports. If a copy of the statement cannot be obtained, the best that can be done is to leave the matter to preparation for cross-examination.

Having thus prepared the plaintiff for direct examination, and prepared him to encounter and to dispel any impeaching evidence, one should next consider the general weaknesses of the case. A cardinal rule of direct examination, particularly of the plaintiff, is to recognize and to concede any weakness in the medical or fact evidence. If this is done early in the direct, it will not only preserve and protect the direct examination from attack on cross-examination, but will actually strengthen the

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[8] Ohio R. C., Sec. 2319.05; 42 Ohio Jur. 367.

[9] 42 Ohio Jur. 408.

[10] First an interrogatory establishing the existence, date and form of the statement must be propounded under Rule 33, Fed. Rules Civ. Proc.; and the production of the Statement for good cause will be required under Rule 34, Fed. Rules Civ. Proc.

[11] At least in Ohio. 17 Ohio Jur. 2d 578.

bond between the plaintiff and the jury. Jurors are naturally suspicious of the impeccable case, and a frank, sincere disclosure of the weaknesses of his case will make the plaintiff a human being to the jury. Further attempts to exploit these weaknesses, by the defense, may be received by the jury with resentment.

When preparation of the plaintiff as a *witness* is considered, his mode of dress and his manner on the witness stand should not be ignored.[12] Naturally the plaintiff will be nervous about his court appearance. In most cases it will be his first time in court. This very natural nervousness, when displayed on the witness stand, may be misinterpreted by the jury as indicative of untruthfulness. A lengthy and careful trial preparation will overcome much of this apprehension. At the same time counsel can acclimate the plaintiff to the "feel" of the courtroom and the atmosphere of a trial. By the time preparation is complete the plaintiff will have confidence in his case—despite its weaknesses—and his confidence can and will be communicated to the jury.

At the trial itself, however, the plaintiff should be specially instructed to sit erect in the witness chair, to talk clearly, and to refrain from exhibiting any nervous mannerisms such as fidgeting, hair twirling, or hand twitching. The plaintiff is prone to grimace, or to display vocal or gestured disapproval of conflicting testimony—a most damaging display, which should be strongly discouraged.

Throughout the entire matter, it is of utmost importance to review his entire background, education and work experience, in order to discover and to recognize weaknesses in direct examination, and sometimes even on voir dire. For example, the plaintiff may be, or may have been, a musician, bartender, or house-to-house salesman. Or he may have engaged in some other occupation against which certain people are peculiarly prejudiced. The plaintiff may even have a prison record, which will certainly be known to the defense. Some people are prejudiced against persons who move a lot, who are unmarried, or who have been divorced. It is obvious how much better it is, psychologically, to make full disclosure to the jury, during voir dire examination or in direct examination, of those facts which

[12] For useful hints in this respect see the works cited above at notes 1 and 2; also, Lake, How to Win Lawsuits Before Juries (1954). For the defense point of view see, Pierson, The Defense Attorney & Basic Defense Tactics (1956).

furnish heavy ammunition for the opponent. We thus have extracted the "shells" from their "big guns."

Preparation of the plaintiff for direct examination is vitally linked with adequate preparation for the courtroom of the direct examination itself. In this respect each case is unique as to its particular strengths and weaknesses. There can be no stereotyped format for such preparation. However, an imperative fundamental must be applied to every case—the fundamental of *organization and continuity,* which the lawyer always must recognize and observe as part of his trial preparation.

The order in which the material to be covered on direct will be presented, must be determined by the lawyer only after carefully reviewing the background of the plaintiff, the liability, and the medical aspects of the case. In one instance the best approach may be initially a series of questions concerning the background and work experience of the plaintiff. In another it may be advisable to develop the question of injuries first, and work back to liability. There is almost no limit to the variety of approaches on the matter of organization of the direct. However, the *objective* is always the same.

*The objective of organization is continuity.* By this is meant a format designed to stimulate the interest of the jury from the inception of your examination, and to sustain that interest throughout the case in chief. Such undiminished interest will establish a *rapport* between the plaintiff and the jury early in the examination, which will be difficult to negate. Do not hazard too much questioning about unimportant preliminary matters, which may cause the jury to lose interest. Should this happen, the essence of the examination will fall on bored ears.

Getting to know and to understand the plaintiff, through his case, is only part of the trial preparation. The direct examination, to be a success, must stand up after the examiner finishes and the cross-examiner takes over. It is an excellent idea, at the conclusion of trial preparation, to take the plaintiff completely through a direct examination, and then to subject him to cross-examination. The lawyer should keep in mind that the good cross-examiner has two prime objectives in mind: first to emphasize the weaknesses of the plaintiff's case through the testimony of the plaintiff himself; and second, to impeach the credibility of the plaintiff as a witness in his own behalf. It is wise to have another lawyer in the office conduct the familiarization cross-examination, so that all aspects of it will be demonstrated

to the plaintiff. However, the order of presenting the material in the courtroom should be different from that used in the office examination. A new approach will stimulate the plaintiff to react in a natural manner in answering the questions, as distinguished from some memorized response, and will result in a freshness and spontaneity that will not escape the jury.

It is not the intention of the writer to offer the foregoing as an exhaustive discourse on trial practice.[13] Rather, the purpose is to project to the reader an *appreciation* of the vital importance of proper preparation of the plaintiff for trial. What is sought to be suggested is a "technique" which is adaptable to the abilities of every practitioner of law, and one which quite probably will be more instrumental in the successful culmination of his lawsuit than any other single factor in that lawsuit.

If the time and effort it requires seems appalling, it is nevertheless the only reliable approach to "guaranteed" success, if there is any such thing. Being aware of the magnitude of the problem, we can say only, as the 102-year-old man said when he was sentenced to 50 years in jail, "I'll do the best I can, Judge."

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[13] For detailed expositions of trial practice and tactics see the works cited above at notes 1, 2, and 12; also the excellent series of monographs published by N. Y. Practising Law Institute on Trial Practice (1946 through 1949).