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THE IMPORTANCE OF TRIAL EXPERIENCE IN THE TRAINING OF LAW STUDENTS

By

FRANK SMITH*

In the many years that I have been on the bench, I have on many occasions been called upon to sit as a judge in moot court arguments of students of the law schools of Philadelphia. In most instances I have been pleased with the evident preparation and the oral arguments of the students. The subject is usually one of interest and is calculated to display research and the ability and ingenuity of counsel. In most instances the students realize the point involved and know how to buttress their arguments with cases in point. The briefs they submit are generally good, well typed, and neat. So as far as moot court arguments are concerned, it is apparent that the instructors and professors of the law schools have done their work well.

Only on one or two occasions have I been invited to sit in a moot court trial, and this I very much regret. The law schools stress legal argument lists but overlook the fact that seldom does a young lawyer have anything to argue before he has first had a case before a court and jury or a court without a jury. It is almost pathetic to observe most young lawyers trying their first cases. They usually do not know how to select a jury from the jury panel. Their lack of knowledge of the laws of evidence worries a judge who is anxious that the case is properly presented. What they do not know about the matter of leading questions is alarming. They seem to be aware of the principles of law governing the matter, but how to bring out the facts and present them to the jury is too often a matter of hit or miss. Many older men at the bar say that by trial and error the fledgling eventually learns how to try a case. That may well be but often that experience is gained at the expense of his client and many times he is likely to lose his client because of his inability to try his case. I believe that the average client comes to a young lawyer because he believes that the young man will be able to properly handle the case in court.

It is evident to me that the youngster trying his first cases suffers from some form of mental distress that will long be remembered by him. A patient judge may attempt to help him, but the judge cannot try the case for the young man. Such practice would not be fair to the other side who may well think that he is getting a rough deal if he is up against a judge instead of a young lawyer.

To overcome a lot of this anxiety and confusion, the law student should have had moot court trial experience almost from the very first year of his course. This course, in my opinion, should not be under the supervision of a teacher specializing in the theory of law but under a competent trial lawyer who has gained his experience in the courtroom. I believe as a matter of fact that moot court trials should be held in regular courtrooms if they can be made available to the law school conducting the trial.

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First, I believe that the student should be taught how to select a jury. Of course he should endeavor to select jurors who at least appear intelligent and impartial. If the jurors appear to be the type of people who might look to be in favor of the opposition, they should be stricken from the list. If the young lawyer is trying a case where a merchant is suing an ordinary citizen, he should endeavor to strike those jurors who appear to be merchants or who are engaged in the mercantile business. If he in turn is trying a case where he represents a businessman, he should be careful to strike jurors who might look with favor upon the cause of the opposition. The main thing is to pick jurors who should have knowledge of the type and character case that is about to be tried, then determine whether they are likely to be fair and unbiased in the proceeding.

In the trial of a case there is nothing so disconcerting to a judge as to have an inexperienced lawyer constantly popping up and objecting to every type of question propounded by his opponent. A lawyer should only object to testimony when it is likely to be of material value to the other side in the outcome of the case and where, of course, it is irrelevant and immaterial. One of the greatest trial lawyers of my time, one Ralph Evans, Esquire, of Philadelphia, never seemed disturbed during trial. He would sit at the table and never interpose any objection unless it was to some vital, irrelevant, or immaterial matter. Then he would quietly speak, and if his objection was overruled he would just as quietly ask for an exception to keep his record safe for a new trial or appeal. A real lawyer who is aware of what is objectionable reserves his objections only to those things and does not make himself a nuisance.

Another thing that the young lawyer does which shows his inexperience is to ask many leading questions. A leading question may be a short cut to the vital issues of the case, but when that vital part of the case is reached, then the lawyer should consider his question and not have the judge constantly say "objection sustained." Actions of this nature are disconcerting to the young trial lawyers and are bound to prejudice the jury against his client. Maurice A. Brown, Esq., late of the Philadelphia Bar, in his excellent handbook on *Evidence* has this to say about leading questions:

"1. Definition

"The common law rule is that a question is leading where it embodies a material fact and admits of an answer by a simple affirmative or negative; but in modern times this rule has been somewhat departed from by a number of decisions which hold that such a categorical question is not necessarily leading, provided of course that it is not so framed as to give an indication as to which answer is desired.'" (Waltosh v. P. R. R. Co., 259 Pa. 372.) A question is leading only if it suggests the answer desired, thereby placing the answer in the witness's mouth.

2. General Rule

"Generally speaking, except as to preliminary matters, one may not ask his own witness leading questions. However, when a hostile or re-

luctant witness is being examined, the trial judge may and usually does allow considerable latitude in the framing of questions. (Com. v. Bruno, 316 Pa. 394.) In fact, it has been said that the rule which does not permit a party to ask his own witness leading questions, is liberally construed in modern practice, (Com. v. Reeves, 267 Pa. 361), and that the extent to which such questions will be permitted is within the discretion of the trial judge. (Com. v. Deitrick, 221 Pa. 7.)

3. When is a Question Leading

"a. Generally

(1) The mind of the witness may be led to the subject of the inquiry, and when a general reference to the subject fails to elicit the information desired, a more specific reference should be allowed as long as it does not suggest the answer desired. (Com. v. Rossi, 47 Pa. Super. 297.)

(2) Though there may be some instances wherein promiscuous use of leading questions may constitute prejudicial error in that, in practical effect, counsel rather than the witness, is testifying (Buckman v. Rwy. Co., 227 Pa. 277), such cases are rare."

Of course leading questions on cross-examination are a matter of right and an attorney enjoys the greatest leeway, but it is a mighty bad habit for a lawyer to cross-examine a witness just for the sake of cross-examination. A lawyer should not cross-examine a witness for any length of time unless he feels that he will be able to elicit an answer which will prove beneficial to his case. Cross-examination at best is a great gamble. I heard Judge Salsberger once say, "I never heard any case that was won on cross-examination alone, but I have heard many cases lost by the cross-examination of witnesses." Therefore each lawyer should size up each witness before going out to the uncharted realm of cross-examination. If he is bright and has made a concise and definite statement even if it is harmful to the lawyer, just brush him off and say, "No questions." It is much better to leave it as it is rather than by repetition to make a lasting impression on the jurors.

There is another matter that I have observed to be a bad habit in young trial lawyers and that is the tendency to repeat what a witness has just said before propounding another question, or they will say, "You said this, did you not?", or they will argue with a witness instead of asking questions. This is very bad practice. The best thing is to ask questions. I think one of the things that a young lawyer should not do is to show his chagrin if the judge rules against him. He should definitely not show any anger even though he may feel it. He should quietly take an exception which will protect him if he is legally correct.

There is another thing of importance. A lawyer should prepare a trial brief on the law and the facts before going into court. He should try to understand the principle of law which governs the facts as he understands them to be. He should carefully question each and every one of his witnesses before he goes to court so that he may know what to expect at the time of trial. If the lawyer on the other side should ask your witness under cross-examination, "Did you speak to anyone

about this case?" be sure to prepare your client in such an event to say, "Yes, I talked to my lawyer." This is what is called a trick cross-examination question and often leaves a witness in confusion if he answers in the negative and the other lawyer then by subsequent cross-examination tries to make him out to be a liar. If the lawyer has not talked to his client or his witness before trial, he is a mighty poor specimen of his profession. In a trial of a case, if one of his witnesses is on the stand and he is all set to have him testify a certain way and the witness changes the testimony, the lawyer should not show confusion. He should plead surprise by making that statement to the judge, then he should ask leave to cross-examine his witness not for the purpose of having him again change his testimony but to destroy his testimony as improper and untrue.

The young lawyer should learn to qualify an expert witness, by showing his past experience, his expert knowledge, and the schools of learning from which he had graduated, and anything else which would show that the witness had greater knowledge on the particular subject than any other layman. The young lawyer should learn how to prepare a hypothetical question to be propounded to the expert and in doing so should carefully include all of the facts in evidence in this question.

When the trial lawyer goes into court to try a civil case, he should be aware of the table nearest the jury box which is reserved for him and his clients. The other table, of course, is for the defendant and his counsel. As soon as he sits at the counsel table he should have his client at his side with his trial brief. He should then start to select the jury from the panel of jurors in the court. If he is counsel for the plaintiff he has the right to strike a juror that he feels should not properly sit on the case. Then he should hand the list, which is furnished him by an officer of the court, to the defendant's counsel who can strike the next juror. Each attorney in this plan by alternately handing the list back and forth may strike four jurors, making eight in all. Then when this jury sits in the box, the first thing he should do before the jury is sworn is to ask them if they are friends or relations of either party or if they have any interest in the outcome of the case. If he finds that a juror is interested he may ask that he be excused or he may strike him and another juror may be selected in his place. When the jury is then sworn by a court officer, the plaintiff for the first time by his counsel may address the jury, stating to them the type and character of case they are about to consider and what he expects to prove. It should not be an argument. It should be a clear, concise, and orderly statement of the facts which he intends to prove. When this statement is concluded, counsel for the defendant may at that time make his statement to the jury, informing them all that he intends to prove or he may wait until the plaintiff's case is concluded and then for the first time address the jury. At the termination of the plaintiff's case, if defendant's counsel feels that the plaintiff has not presented a proper cause of action he may ask for a non suit. Or he may put on no witnesses and submit a point for binding instructions, which is a written point handed up to the judge explaining why the verdict should be given to the defendant. If the

judge refuses a non suit, then if the defendant's counsel desires to put on his witnesses, he may. Then the case goes on until the last witness has testified. When the case is concluded, the plaintiff's counsel may rise up and to the jury relate the facts as he understands them to be and, of course, in a manner that will be helpful to his client. When he has finished, the defendant's counsel may arise and make his speech to the jury. At the conclusion of the speech of defendant's counsel, plaintiff's counsel may then reply to the argument presented by the counsel for defendant. If the defendant's counsel has put on no witnesses but is relying upon a legal point to obtain a judgment on behalf of his client, then he may make a speech to the jury and plaintiff's counsel is not entitled to reply. After this is all finished, then the court charges the jury on the questions of law. If there are any particular points of law which either counsel wishes the judge to include in his charge, they should hand up to the judge a paper on which these legal points are set forth, and this should be done before either counsel makes his speech to the jury so as to give the judge an opportunity to read these points while the speeches are going on.

The jury then retires from the courtroom for consultation and then returns with its verdict. This verdict of course has to be unfavorable to one side or to the other, and the losing side always has the right to file a motion for a new trial and where legal points are concerned, for a motion for judgment non obstante verdicto. These questions are heard at a later date by a court en banc and the trial lawyer always has an opportunity to prepare these points within a reasonable time to submit them to the court.

I realize that this is a very brief exposition of what may be the experience of a young lawyer in trying his first case. If the various law schools should initiate this idea as a part of a law student's education even as early as the first year, then I really believe that the novice would be able with more assurance to conduct himself properly as a trial lawyer in his first case.