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## The Trial of a Lawsuit

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# The Trial of a Lawsuit

By LESTER H. LOBLE\*

The trial of a lawsuit is an art. The answers will not be found in the books, but in court by trial and error. There are certain things one can learn from long experience in the courts. I will devote these lines to some observations on the trial of a criminal case but the same principles apply to a civil suit.

## *BEFORE THE TRIAL*

The first step is to check what the state is going to try to prove, and then to ask your client his version of the facts. He may have a perfectly legitimate, honest defense to what looks like an air tight prosecution. Interview at once the witnesses he tells you about and, if possible, get affidavits from them.

If your client tells you he is guilty, either plead him guilty and do the best you can for him, or go to trial—but do not put him on the stand. You have a right to make the state prove him guilty.

Assuming your client is not guilty it is desirable to place your opponent on the defensive as early as possible. Examine the information, the statute, the cases, and if the information is vulnerable, open with appropriate motions and demurrers. Start building a record. If the information is fatally defective, confine yourself to a general demurrer and objections to the introduction of evidence. You are under no obligation to teach the prosecution how to draw a good information.

## *THE JURY*

Before the trial obtain a list of the jurors. If you do not know who they are look up their names in the city directory. Find out what you can about them. Do not talk to any juror. Remember as you go to trial certain factors: Generally women jurors are more likely to convict a woman, whereas men may not, and vice versa. There are persons of certain nationalities who tend toward acquittal; certain are inherent convicts. I won't elaborate. You will find out.

See that you do not go out on a social engagement the night before the trial. Look your best, and be confident, no matter how many butterflies you have. Dress neatly and see that your appearance is up to par.

See that the jury panel was properly called, but if not, challenge the panel. If you do this in the presence of the jurors be sure to make it clear that your challenge is directed to the improper way the officials performed their duties and not any objection on your part to the jurors. If you don't the jury will not like you.

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Now comes the impaneling of the jury, one of the most important parts of the trial, and a lost art. Remember, the juror is in a strange atmosphere. He doesn't know one person from another and probably doesn't know what an information is. Make him feel at home. Don't embarrass him by technical legal questions. Make a friend of him. This is the wrong way: "What is your name?" (You ought to know that.) "How old are you?" (What difference does it make? And, if it is a woman you are in trouble.) Then the prize mistake: "Have you any bias or prejudice?" (Who is going to admit that?) Often the questions are asked of each juror in such a humdrum way that everyone almost goes to sleep.

Now for the right way: Plan in advance what you are going to ask. Not more than four or five questions to a juror. If possible ask each in a different way of each juror. Sell yourself and your defense on the voir dire—go as far as you can until the other side stops you. For example say, "I believe that the court will instruct you that the presumption of innocence attends the defendant at every stage of the trial. Will you readily accept such an instruction? Say it like you mean it. The same on reasonable doubt. If it is self defense, ask him if he would stand up for that principle in the jury room. Challenges for cause are made orally, and every one hears it; peremptory challenges are in writing and are secret. Don't challenge for cause unless you are quite sure the juror has shown himself disqualified, and if you lose, be sure to challenge him peremptorily when your turn comes for peremptory challenges. Get rid of him because he will probably be disposed against you.

Use your peremptory challenges carefully. Look up the statute to be certain how many you have. Keep track of the uncalled jurors in the box, and remember, you might get a worse one than the one you challenge.

### *CONDUCT OF THE TRIAL*

At the beginning of the trial ask for the exclusion of all state witnesses from the court room. If a witness sits in the court room and hears another witness testify he usually follows the same pattern and he knows how you are going to cross examine.

When you make your opening statement speak up so you can be heard and give it the air of sincerity. Question witnesses so that you can be heard. Rarely walk up to the witness, you obstruct the vision of members of the jury. Do not ask leading questions (a common weakness in young lawyers). Do not sit on the table or lounge (another practice). Court room decorum is important.

Never put a witness on the stand unless you have talked to him in detail. If on cross examination you hear unexpected answers don't try to clear it up on redirect if you can avoid it. Excuse the witness but not from the trial. At the recess find out what the new matter is about, and then ask the court to permit you to recall him for further direct. It may well be that if you know the facts as newly developed they might be beneficial to you.

If your witness testifies differently than you expected ask leave to cross examine him as a hostile witness as the statute permits.

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When a witness is called against you, on cross examination show his interest, his friendship to the parties, and to whom he has talked about the case. Impeachment is effective, and there are a number of ways to use it. Examine the statute and authorities. Remember also that cross examination is the art of what not to ask.

Watch for rebuttal testimony after you have rested. It can be devastating. Try to anticipate it. Do not make too many notes. You will miss much of the testimony. Do not be afraid to object to improper questions asked by your opponent. Learn how to make an offer of proof so as to protect your record.

Spend time preparing the instructions you are going to submit to the court, and have your authorities ready to argue to the court. If you object to an instruction of your opponent state your reasons. It is not enough to say it is contrary to the law.

### CLOSING ARGUMENT

Prepare your argument carefully. Have some pertinent notes that you have worked out the night before. These should be headline notes that you can easily see at a glance.

If there is a point that your opponent is particularly weak in, turn to your opponent in your argument and say: "Mr. Smith, when you make your argument answer this question. . . ." If you have a dozen, so much the better. He will spend his time answering your questions. The following is effective: Memorize the name of each juror sitting in the case, and in your argument, in addition to talking to the jury generally, talk to each one individually, calling him by name. For example: "Mr. Smith, you are an accountant. No one knows better than you that the way the state's witness testified (point out what he said) is clearly wrong." Try to make your questions to each adaptable to the juror's vocation, and show that you realize his knowledge is greater than yours, or that of anyone else. If you talk to the jurors individually be sure to talk to each one, for if you leave one out he will be offended. The juror is pleased that you remember his name and that you recognize his intelligence. Some judges may sustain an objection to your talking to individual jurors, but I think that it is clearly permissible.

### AFTER THE TRIAL

Whether you win or lose go down town that night and mingle with the people. You might hear some flattering things about yourself that will help your ego. On the other hand—well, it might help you with your next case.

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