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Dedicatory Address: The Art of a Jury Trial

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Ladies and gentlemen, President Davenport, and other great figures in Pepperdine's quickly growing history: Ordinarily I would consider it my first duty to disavow some of the generous compliments of Judge Rymer, but I will not do so today; I accept every compliment. And the reason I do is that I have read a number of her opinions, and I know that she is dedicated to accuracy. I would not insult her by telling her that what she said about me wasn't exactly true. Indeed, she has a great reputation for understatement. I am sure that if it were not for that frailty on her part, she would have done me more justice. Seriously, Judge Rymer, I'm very grateful to you.

The topic assigned to me today is the art of a jury trial. Indeed there is no special way of describing that topic, anymore than there is a special way of painting a painting, composing a musical composition, or writing poetry. The jury trial expresses to the fullest the character and abilities of the trial lawyer. There are trial lawyers who stampede the courtroom with a loud voice, cross swords even with the judge, attack opposing witnesses, and yet, when they are through with their day's work, they have persuaded the jury of the rightness of their cause. And on the other side of this equation, is the kind of successful trial lawyer who never raises his voice—if you can recall perhaps Max T. Stoyer, he whispered; the jury had to lean forward to understand what he was saying—who even treats opposing witnesses with delicacy and friendliness, and even when he inserts the knife in cross examination, he does so bloodlessly. And yet that kind of a lawyer can be very effective. So, the first lesson is, if you're a neophyte, don't pattern your style after any particular lawyer; use your ability to the utmost. It is the rule to avoid affectation in the courtroom, which is as disliked as affectation in

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the living room.

There is only one rule for successful trial practice, which I shall be adamant about, and that rule is: thorough, thorough preparation. Extraordinary, indefatigable preparation. Fantastic preparation, day and night. It is the secret of success in the trial room. There is no substitute for it.

The moment a client comes to his lawyer's desk, the lawyer asks him for all the documents. For some reason, there are always very old and unimportant documents which are in an attic—I don't know why they are always in an attic. Demand them. Make a personal, written summary of each document. Sometimes, in the course of that trial, somebody will testify to something and that unimportant, irrelevant document will swim into your mind, and the case is in hand. The successful lawyer must be thoroughly prepared. And the proof of that is that successful lawyers, no matter how successful they become, never stop to prepare thoroughly for the next case.

I need not tell you that there are different styles, but there is one style that cannot be changed, and that is thorough, thorough preparation. Now, the neophyte doesn't have to be alarmed by this. He still has all the opportunity for ebullient improvisation, for turning like a gyroscope to keep his balance, and for a marvelous insight with which to break a witness. All that is available to him, but those are all satellites, and the sun around which they revolve is thorough preparation.

It was a doctor who said it best (I wish it was a lawyer): Dr. Osler, the famous surgeon, once wrote, "There is a word in the English language which opens portals. The stupid man it makes bright. The bright man it makes brilliant. The brilliant man it makes steady. And that word is *work*." It cannot be substituted for by your assistant, no matter how large your law office is. You, the lawyer who is going to try the case, must have thorough, thorough preparation. Now, since this is the message, most talks on the art of a jury trial end there. I shall begin there.

Suppose the neophyte says, "I am ready to follow your advice. I will work my head off. I will lose five or six pounds in every trial [which I think is the rule]. But how do I apply all this energy? What am I supposed to do?" I think that's a fair question. And so the rest of my talk will be devoted to trial strategy, and every phase of a trial.

First, the selection of a jury. Most lawyers say, "Well, what is there to prepare for that?" Selecting a jury may require hours of consideration. Do you want an old juror or a young juror? Do you want male jurors or female jurors? If, for example, you want a large verdict, you usually want male jurors. Recently, however, women are also in that classification. But most of the time, if you want a very large verdict, it is better

to have male jurors. What nationality would you prefer, if you had a choice, for your juror? That depends upon your witnesses. All these considerations may take hours of preparation.

It is your duty in examining jurors to get to know them a little better. Now, it is a fact that we don't read faces as well as we read voices. And one of the things that is difficult in selecting a jury is to get the juror to speak up. Unfortunately, you can't engage in general conversation; you're limited to certain types of questions. Finding a way to woo the juror into revealing himself to you requires many psychological aspirations, and we must learn them. For example, try saying something light. If the juror's face lights up with a bright smile, and he enjoys it, that's a good sign. If you walk to another juror to examine him, and he follows you with his head; that's a good sign: he's invested something in you. If he looks straight ahead with a very thin mouth, beware.

The next matter is, what kind of questions do you ask a potential juror? It is important that you do not ask questions which irritate the juror, and yet you must dig into him, and find out how he believes. Cases can be lost during voir dire. For example, in a matrimonial case, when the lawyer indelicately asks each juror whether he's had any trouble with his wife, or husband, you can see the daggers flying from the juror. That man has almost lost his case, right there and then, even though he thinks it's a proper question.

Then there is one question that is universally put to jurors which I've never seen the sense of. And it never fails; every lawyer asks it. The question reads as follows, and I implore you not to use it: "Would you be prejudiced in favor of the plaintiff in this case, a pretty young girl who suffered a severe injury, against the trucking company which is defending itself here, and whom I represent?" Now, do you expect a juror, in the presence of eleven other jurors, to admit he's prejudiced? He always gives you assurance: "No, no, I will decide on the facts of the law." That question is wasted. But suppose you put it this way, leaving out the word prejudice: "We all have sympathies. I have sympathies for this plaintiff who's been injured, and I know you have. But it is our duty here to determine whose fault it was, and anymore than you would like to volunteer to pay for her recovery, the trucking company likewise is defending itself. Now would you *lean* (lean is a much softer word than prejudice) would you lean a little bit in favor of the poor girl who's been injured, for whom I have as much sympathy as you have? Or would you decide this case on the true facts and the law as charged by His Honor?" In that way, you may get an admission of prejudice. You'll never get it if you ask him if he's prejudiced. So there

are many techniques in jury selection which require careful preparation.

The next phase of the trial is an opening statement. Now, many lawyers differ on the proper way to deliver an opening statement. But no matter how the lawyer chooses to deliver his statement, it requires our old friend, thorough preparation. I must confess that I have worked three, four, five hours on an opening statement which will take twenty minutes.

There are two schools. One is, be brief, don't promise too much, let them hear it from the witness stand, don't give away your case entirely. The other school says no, it's an opportunity to win over the triers of the facts, they're the judges of the facts, just as the judge is the determiner of the law, and it's an opportunity of making a relationship with them on the facts which you are going to produce. And as for the repetition, when the testimony is taken, don't you like to know that your facts are recognized? It doesn't hurt to have a repetition, provided you've been skillful, and you haven't given away a cross examination clue that you may have had. Indeed, you've placed more leads on the opening hole, so that your opponent will tread more lightly on it.

Jurors sometimes resent the lawyer getting up and making an opening statement: "I came here to hear some testimony, what is this man making a speech at me for?" The answer is that if you have so prepared your opening statement, that it gives you an equitable start, you've gained a great deal from the triers of the facts.

I want to tell you an anecdote of a lawyer who thought that opening statements weren't very important. He sent his junior, who was very bright, to make an opening statement, and give him the opportunity of the limelight. The junior made a heroic statement, marvelously dramatic, and when he went back to the table, the client congratulated him. He said, "That was just a wonderful statement." And the old lawyer sitting there said, "Yes, it was. He opened the case so wide I don't know how in the hell I'm going to close it." The opening statement must be modest; it must be subject to proof. If you promise too much, you're in trouble. I suggest that you prepare your opening statement in order to get a head start on the morals and the justice and the equities of your side of the case. It is an opportunity to get a head start with a jury, and must be taken by again, thorough preparation.

Now then we come to the preparation for direct testimony. I hope you're not going to be the kind of lawyer who lets his associate write out the testimony that the client will give, reviews the associate's outline of the client's testimony and then examines the client based on the associate's outline. If you are, you don't understand the facts of life. Your client has never faced an audience in his life, then suddenly he is put in the chair, facing a large courtroom audience. On his right is a judge with a black robe, which puts terror in his heart. On his left is a

jury watching every movement of his hands and the scissoring of his feet, and in front of him is a sea of faces. He sees the opponents sharpening a pencil, but he believes it's a knife that's going to be stuck into him. In front of him is a stenographer who's taking down every word, so if he slips and makes a mistake, the whole world is going to know it. He is confused, the blood is pounding in his head, and you stand there asking him questions. It's amazing to me that he can even give his name and address. What is necessary is our old friend, thorough preparation.

You, not your assistant, you, if you're going to try the case, must talk endlessly to your client. Let me divert for a moment to make clear that no lawyer is successful who plants on his client a story that isn't true. Never am I so confident of winning a case as when I observe that the opposing client has gone out of his way and has had some evidence grafted on his mind. A jury will forgive a mistake; it will never forgive a deliberate lie. And, having tried cases in many states of this country and indeed in several other countries, I have never met a lawyer of standing who is dishonorable enough to resort to what laymen sometimes think is a practice of coaching the client to say something which will help him in his case; it never does. A trial is a mixture of facts, some good and some bad; therefore, there will always be some fact that is against your client. But remember, you win a case not by unanimity, but by a preponderance of the evidence. If you have an honest client who admits he has made a mistake, but goes on, he has made an impression with the jury which is invaluable. Don't be afraid of contradictions. If you want to win the case by unanimous evidence, it is a false hope. No case is completely clear. If it were, it wouldn't be in the courts. So, you must prepare the client personally, not through your assistant. If he makes a mistake, you correct him, but if the mistake is against himself and it's true, tell him to say so. It is much better that we can say to the juror later, "You see how honest the client was."

More importantly, if the lawyer is dishonorable enough to plant an idea into the witness' mind, he has lost that client. Would that client entrust him with his worldly estate in a will? Will he come to him again? You have cut off your relationship with your client. So thorough preparation means that you get the client to accept the truth, to present it as favorably as possible, but to accept the truth. The preparation of a case means an honest presentation of the facts. I've never met an outstanding lawyer who didn't have a sense of honor about such things, although unfortunately, people think otherwise.

Next is cross examination. Skillful cross again is the result of

thorough preparation. If you have a document which contradicts the witness, you don't spring it at him. He's embarrassed, but he says "Oh, I think I was mistaken," and the effect is lost. You prepare ten or fifteen questions incorporating the error in his letter, and he keeps repeating that error, and then you finally confront him with the letter. The difference between that and immediately confronting him is like the difference between an atomic bomb and a little pistol. So there is a skill in contradicting a witness which you must learn, and again it comes to you from thorough preparation.

Now we come, in this brief summary of the art of a jury trial, to the summation. It takes endless hours to prepare a good summation. I have a suggestion to make to you. In a long case, particularly, an important case, which I hope you will be trying, always ask for the minutes of the day's events. Usually they are ready later that same night. Read through the minutes and make notes of everything you find helpful. You will then have that information gathered for summation. Now, when you are summing up, use the following device which often is available: "I am not going to sum up this case to show you we were right by quoting my client, I will show it out of their mouths." And you begin reading an admission here and there, a comment by the judge which is favorable. Read from the minutes; it is a very effective technique.

It is good to make your summation surround a device of some kind. It is also good sometimes to create an image for the jury at the end of the trial. For example: "A certain kind of fish, when it is in danger, emits black fluid, and in the darkness, escapes. That was the tactic of our adversary. Every time he came to a critical point, he emitted black fluid to escape. Let me show you. Page 48, on the third day of the trial. He was asked the following question. His answer? 'I don't remember.' Some of that black fluid. At page 76, he was asked the following question. He said, 'I don't think that's so, but I really don't remember.' Black fluid."

Finally, of course, you're deferential to the judge, you're kindly towards the stenographer, you don't insult or find fault with the judicial system. If something goes wrong, it's your fault, inadequate preparation. The be-all and end-all of successful trial lawyer.

I've been asked many times whether luck plays a part in a jury trial. Of course it does. But it only visits me when I'm in the law library at 1:30 in the morning. It never visits me when I'm on the golf course, or in a theater. If you are dedicated to your cause, you will have luck on your side.

Now, I would like to tell you an anecdote. Rufus Choate was a wonderful trial lawyer; he's famous. One day he was conducting a trial, and the man who was his neighbor and knew all about his reputation as a wizard in the courtroom, said to a friend, "I set myself against his tac-

tics. He could charm a bird out of a tree, and I wasn't going to let him do that, as a juror. I was going to look at the facts." He said, "I did more than that. I told all the other jurors, 'Do you know of Rufus Choate's skills? He can make black look white. He's a magician in the courtroom. We are here to do justice. Don't let him get under your skin.'" Rufus Choate stood on his head; it didn't do him any good. The jurors realized they must do justice. So his friend said, "Were they unanimous against Choate's client?" "Oh no, we decided for Choate's client, but that was only because the facts and the law were on his side." And when the lawyer is skillful, the facts and the law will more often be on his side.

In my tenth book, which I have just written, and which some of you were kind enough to have me autograph here, I decided to create an oath for the lawyer. Doctors, as you know, have had the Hippocratic oath for five hundred years. Lawyers have bar associations, but they have never had a personal oath, which they should have. So let me, if I can, through memory, give to you accurately, a lawyer's oath:

> "Please God, give me the good health with which to resist the rigors of the most arduous of all professions, the law. See that everybody around me has confidence so that I can, like a gyroscope, move in the storms of contest. Touch my words with eloquence; not in the sense of a harangue, but in the true sense of eloquence: a flashing eye under a philosopher's brow. Give me good sleep, for while I must keep my mind on my work, I must not keep my work on my mind. See to it that I never lose the intensity of devotion to a client's cause, for by such intensity there are sometimes flames, and the flames leap over the jury box and set fire to the conviction of the jurors. See to it that I do not worry too much, particularly anticipated worries, which are like debts or payments on debts which never come due. Above all, I honor you for having put me in the profession of the law, which is dedicated to justice, imbued with the spirit of reason. We cannot control the length of our lives, but we can control the width and the depth of our lives. And I know that when you finally touch me with your finger to permanent sleep, and examine me, you will not look for honorary degrees, or victories in the courts; you will look for scars: the scars suffered by making the world a better place to live in. You have always honored us. I will always honor you. Amen."

Thank you.