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THE ART OF THE JURY TRIAL*

LOUIS NIZER

I do not expect this evening to be memorable to you, but I know that it will be most memorable to me as the one in which I reach the peak of my audacity. For me to address the distinguished members of this Association upon the art of a jury trial is to assume a degree of knowledge and expertness which I, of course, disavow, and I am delighted that there will be a period of questions and answers so as to give you a fair opportunity to dissect the lecturer; also because I consider this talk merely an exchange of views, from which friction I hope there will be a spark to illuminate this most fascinating and difficult subject.

I am also encouraged by the fact that in a certain sense there is no right or wrong way to try a case, any more than there is a right or wrong way to paint a painting or to write a poem. That is the right way to try a case which expresses your personality and your talents to the full, because the art of persuasion—and that is what a jury trial is—the art of persuasion is such a complex of psychology, insight, learning, facility at thinking quickly, felicity of expression, and of the myriad forms of personality, that there is no precise, scientific measuring yardstick for it.

We all know of the successful trial lawyer whose method it is to boil over with righteous indignation, to attack witnesses boldly and loudly, to permit his sarcasm to spill over his adversary, and even to cross swords with the presiding justice himself. We know that that kind of lawyer will often set the atmosphere around him aflame, and those flames will leap across the barriers of the jury box and set fire to the conviction of the jurors.

We also know the extreme opposite type of trial lawyer: the man who is suave and quiet, kindly, almost timid; who approaches even a hostile witness with great friendship and who, even when he inserts the knife in cross-examination, does so bloodlessly; who is deferential to his adversary and obeisant to the presiding judge, and yet who nevertheless also persuades the jury of the justice of his case by the calm, reasoned effort he is making for his client.

In between these two methods there are a whole variety of compromises, as many as there are personalities of men.

So, obviously, if you are the kind of person who becomes righteously

*The text of this article is a transcript of a lecture delivered by Mr. Nizer to the New York County Lawyers' Association in New York City in April, 1946.—Ed.

indignant about a cause, don't pattern your style after the suave lawyer. The jury is very likely to resent your imitation of another as well as the ineffectualness of your pretended calm. If, on the other hand, you are a quiet, unassuming attorney, please don't pattern your style after the lioness type of lawyer, because the jury is likely to resent your hypocrisy as well as your bad acting.

That is the best method which represents you. We hate affectation in court rooms as well as in all other places. You can best express your talents in your own way.

There is only one thing that I shall be didactic about this evening; more than didactic, I shall be arbitrary about it. I shall brook no disagreement on this subject. I shall be defiant if you differ, and I shall be supported in that obstinacy by all of the trial lawyers who have ever tried a case and, indeed, by the unanimity of expression of all the literature on the subject, and that is that the most important qualification for an able trial lawyer is *thorough preparation, hard work and industry*.

I don't think that should disappoint you. There is all the opportunity that you may wish for flashes of insight, for ebullient improvisation, for balancing like a gyroscope in a difficult storm, but all of these qualities and many more are satellites of the great sun around which they swing. That sun is hard work, preparation and industry.

From the moment that you begin to ferret out the facts from your client and witnesses, from the moment that he brings you his papers—(and incidentally, he will always tell you that he has brought every document which has any relevancy, but please insist that he bring the irrelevant documents and you will usually find that the reason he has not brought them—and he is reluctant on the subject—is that they are hidden away in an old box in the cellar. I don't know why it is, but all these documents are always in an old box in a cellar or attic)—dust them off, make a careful list in your own handwriting so that you will not forget them, and even if you find them irrelevant, keep them in mind, because most likely during the course of a trial some witness will state a fact which no one expected him to state, and there will swim into your recollection that musty old irrelevant document. You will have the case in your hand.

And when the trial begins, why then your industry begins all over again. After the court has adjourned, of course, you must work till two, three, four, five in the morning, see the sun come up, wash your face and go to court. In order to prepare for the next day, you will dispatch messengers who will find new witnesses to testify concerning matters not previously

anticipated. You will prepare a trial memorandum of law for the court overnight with respect to the admissibility or inadmissibility of an imminent bit of evidence. And this must continue day after day, night after night—sleeplessness, hard work, industry, preparation, until the case is over.

Now, I should say no trial lawyer is worth his salt if he does not lose at least six pounds during the course of the trial. But now, suppose that a novice were to say to you: "I am ready to accept your advice. I am ready to work as hard as you say." Suppose that you have read to him—and it shall be the only quotation I shall read to you this evening, because I find it so eloquent on the main point which I shall repeat and repeat, the *necessity for hard work*—and peculiarly enough it is a statement not by a lawyer, but by a member of a profession which has such excellent public relations in contrast to our own. The physician, Sir William Osler, once put it this way:

"There is an old folk lore legend that there is some mystic word which will open barred gates. There is, in fact, such a mystic word. It is the open sesame of every portal. The great equalizer in the world, the true philosopher's stone, which transmutes all the baser metal of humanity into gold. The stupid man it will make bright, the bright brilliant and the brilliant steady. With the mystic word all things are possible. And the mystic word is 'work.'"

You read that to the novice and he says: "I am persuaded. I am ready to work as hard as you require of me because I want to be a good trial lawyer." But suppose he also says to you: "How am I going to apply all this industry so as to attain my objective?" That would be a very fair question.

And so, although the point that I make about "thorough preparation" is usually the ending of addresses on this subject, I have made it the beginning of my talk because I hope not to hide behind generalities.

The question is: "How can all this work aid me from a utilitarian viewpoint?"

- Well, let us start the trial with the selection of the jury.

I think some of you who have experience will say: "Certainly you don't need any preparation for that."

May I respectfully differ. You do. You ought to consider very carefully in advance what kind of juror you want in that particular case.

Do you want more women jurors than men jurors? If it is a case in which you hope to obtain a large verdict in terms of money, you do not want women jurors. The attendants in the court rooms will tell you that women jurors usually give smaller verdicts. They are not people of large business affairs, as a rule, and they do not often grant large verdicts. If

you are a defense attorney in the case, obviously you want more women jurors.

Do you want young jurors or old jurors? There are many considerations which will determine your decision in that field. I shall not stop, at such a brief meeting as this, to list them all.

Do you want men of experience in certain fields of endeavors, specialists or industrialists, or do you want the ordinary man on the jury?

And then some hints with respect to the selection of the jury.

There are two schools of thought on this, as there are on most subjects, except the subject of thorough preparation.

One is that although we all pride ourselves on knowing human nature and reading faces, none of us really has the gift. You are always taking a chance, anyhow.

And so it is best, once you have satisfied yourself that the jury does not know counsel or litigants, and has no surface prejudice in the case, to waive further examination and, with a grand gesture, say: "Jury satisfactory."

Many good lawyers do that. They hope to profit from the fact that the jury will say: "He has great confidence in his case, because he doesn't question us much."

And there is the other school, the school which says:

It is not given to you in other fields to pick your judges. You can't pick them in the State courts, in Equity trials, or in the federal courts. But the law gives you an opportunity to pick the judges of the facts. It is a precious opportunity and it should be used with all the resourcefulness at your command.

I cast my vote for the second school on that.

It is important to select a jury very carefully, and since we do not read faces as well as we read voices and mannerisms, it becomes important to induce jurors to talk. That is a very difficult art, because you are not permitted to engage them in conversation. You must do so in the form of questions which are rather limited. Very often a hard, severe and cool face lights up in a kindly manner when the juror talks to you.

And also, very often—and this is the only part of a case in which I really depend on my intuition—you sense a bond of sympathy, or receptivity—let me put it that way—between the juror and yourself. If you sense that receptivity, he or she is a good juror, even if other qualifications are lacking.

But now, in addition to that, you are permitted to ask specific questions to elicit whether the juror is prejudiced, and I find that many good lawyers ask

this type of question, although I have never, myself, been able to discern any good judgment for it: The lawyer says to the juror—let us suppose it is a case in which a young lady sues a large corporation: "Have you any prejudice against a corporation, or any prejudice in favor of a young lady who is suing a large corporation?" And invariably the answer is: "No; I will decide this case on the facts and on the law."

What would you expect the juror to say? Sitting there in the presence of eleven strangers, do you expect him to make a confession that he is prejudiced?

But now suppose, instead of that wasted question, you made it palatable for him to admit his prejudice in this manner:

In the first place, I want to apologize for asking you some of these questions and prying into your mind. You understand it is not curiosity. The law places upon me the heavy responsibility of selecting a jury which is unbiased, so that we start from scratch on both sides. You understand, that sir. Now, we all have some prejudice or leanings—(I like the word "leaning." It is much softer). We all have leanings. I have them. Sometimes, subconsciously, you have them. Now, if I were in your place and you would ask me, I would feel I had a duty to be candid with you. So, in that spirit, I shall take your answer at face value and rely on it. Sometimes, subconsciously, we lean in favor of an individual who is suing a large corporation. You may have such a feeling in this case. If you have, I would appreciate it very much if you would be frank with me.

After such an approach you might get the answer:

I think I might be a little more in favor of the plaintiff under such circumstances.

I do not say that you will, but you might, obtain the admission of prejudice. I do not think you will ever obtain it the other way. A juror's candor must be wooed like a woman's love. It cannot be earned by a formal question. It is rare to find a juror such as a prosecutor in a murder case questioned: "Do you believe in capital punishment?" he asked bluntly. The juror replied: "Generally, no—but in this case yes!"

After the jury has been selected and sworn in, counsel make their opening statements. Here, again, there are the customary two schools of thought. One school says: Make your opening as brief as possible. Simply state your facts, those that you hope to prove. Do it succinctly and be conservative. Don't promise too much. Let the witnesses tell it from the witness stand. The jury will be more impressed when they hear it from the witnesses for the first time.

The other school says: No. The opportunity of an opening statement, if skillfully taken advantage of, gives you a leaping start over your adversary. It should be exploited to the full.

Once more, ladies and gentlemen, I should like to cast my vote for the second school of thought.

I think it is extremely important that counsel, by thorough preparation, so design his opening statement that although he is merely listing what he hopes to prove and does so conservatively, the juxtaposition of his thoughts and analysis of his promises, the points at which he drags in his adversaries' claims, and then states what he is going to prove with respect to these claims; the manner in which he does it, the sincerity with which he conveys the feeling at the very outset that his client is right; that the facts point to the justice of his cause—all these offer an invaluable opportunity through counsel's mouth to condition the jury favorably toward his client.

I know the adversary may arise: "Your Honor, I object. This is a summation, not an opening."

That is a risk you have to take. But I think that there is such a fine line, such a thin line, between a carefully selected statement of what you intend to prove and a persuasive statement of what that proof means if you adduce it, that your skill and thorough preparation can transform one into the other without violating in the slightest the rules applicable to opening statements.

As for dulling the effect of the testimony by its predigestion, any persuader can deliver a long preachment to you on the necessity of repetition. I would rather say that a jury might enjoy recognizable testimony and assimilate it more quickly, just as most of us enjoy a familiar tune more than a strange one. Of course, surprise elements should be hoarded. Your opponent should not be educated as to matters concerning which you believe he is still in the dark. Obviously, the traps should not be uncovered. Indeed, you may cast a few more leaves over them so that your adversary will step more boldly on the hollow ground believing it is solid. All this requires that the opening statement be most carefully prepared for its omissions as well as its contents. I can only confess for myself that I have sometimes labored five or six hours to organize in my mind a statement which was delivered in twenty minutes. In this way you avoid the error of the young attorney who was permitted by senior counsel to open the case because he did not consider that the opening statement was very important. The junior, suddenly being cast into the limelight, made a magnificent, eloquent opening. When he was through, the client approached him and enthusiastically congratulated him on his fiery opening statement. The senior attorney, sitting there dolefully, said: "Yes, it was a

very, very eloquent opening. He opened the case so wide I don't know how in hell I will ever be able to close it."

Also I should like to submit this to your respectful attention. I do not think a lawyer should ever launch into his opening statement without some explanation. We must not assume that the jury knows why the lawyer is going to make a speech. Jurors sometimes resent the lawyer's intrusion.

Some such introductory statement as this I think is useful:

Ladies and Gentlemen of the Jury: As this case progresses there will be witnesses on the stand who will give testimony for the plaintiff and other witnesses for the defendant. Sometimes it is difficult for a jury to see the relationship between each bit of testimony given piecemeal and the entire case. The law recognizes this, and therefore gives me and my distinguished adversary the opportunity of making an opening statement to you, in which each of us will tell you what he hopes to prove. Thereby, knowing in advance the nature of our case, you will be better able to follow each bit of testimony and recognize its bearing on the entire case. I avail myself of that opportunity, and I shall now make an opening statement to you of what it is that my client intends to prove.

I think some such introduction sets the proper state of receptivity for your remarks.

I now move on to the next phase in the case—the presentation of witnesses.

I hope you are not the kind of a lawyer who puts a witness on the stand relying upon the preparation which your assistant or associate has made and who has handed you a note as to what this witness will testify to. I hope you are not the kind of a lawyer who puts the witness on the stand after you have yourself perfunctorily examined him to determine the nature of his testimony.

If you are that kind of a lawyer, may I suggest to you that you are overlooking some of the elementary facts of life.

Put yourself in the position of the witness. He has never faced an audience before in his life. Suddenly he is placed on a platform, and to his right sits a Supreme Court justice with a black robe, which in itself is sufficient to put him in awe and in terror. To his left there are twelve jurors looking at him very skeptically and critically, and who examine every motion which he makes, as well as every word which he utters. In front of him are a sea of faces, and by this time he sees, out of the corner of his eyes, already dimmed, the leering faces of the defendant and his witnesses looking up at him. In front of those hostile faces he sees opposing counsel sitting anxiously on the edge of the seat. He imagines by this time that the cross-examiner is slowly sharpening a knife, waiting to spring at him and cut him to pieces.

And while all these confusing surrounding circumstances are pressing in upon him, and his blood is pounding in his head, you stand there presenting questions to him. It is surprising that he can even answer the first questions put to him by the court attendant: "What is your name and where do you live?" And if you expect him, in the light of these circumstances, to be descriptive, to be articulate, to be finely sensitive to a point that you wish him to develop—well, you are simply expecting too much from human nature. There is no use going to the restaurant during recess hour and complaining about your fool witness; how he made incredible answers against his own interest and in violation of the truth. The fault is yours and mine. If we put him on the stand without greater preparation and take that risk the fault is not his.

The law permits you—it does more than permit you, it makes it your duty—to examine your witness carefully in advance to refresh his recollection as to dates and details by exhibiting documents to him which establish these matters; to acquaint him with the sequence of questions so that the truth may be established in orderly fashion and without confusion which may throw doubt upon it. It is the only way, in fact, in which you can present the truth. For the truth never walks into a court room. It never flies in through the window. It must be dragged in by you through evidence, so that the jury is subjected to the stimuli of the facts which you possess. And incidentally, if you examine your witness carefully in advance you will find out what kind of person he is. If he is timid, you must encourage him and lead him. If he is impulsive and talkative, you must restrain him. And also, you learn whether he is an impressive witness or not, which has nothing to do with his intelligence or culture. Very often a lowly, humble witness talks with such sincerity that you know he is making a good impression.

You must learn these characteristics in advance from personal contact with the witness, not at the time you reach the jury box. Such knowledge enables you to determine the sequence of witnesses, a very important consideration. Ideally speaking, it is good to have a very strong witness to open your case, a very strong witness to close your case, and the weaker witnesses in between, all of which, of course, must be modified to the necessities of developing the facts in certain sequence.

But if you forego these considerations and simply put a witness upon the stand, you are taking a risk. Usually you lose the gamble and you have disserved justice, because such a witness often, in his confusion, will make a slip and as frequently as not will distort the truth against himself.

I shall not even comment upon the obvious distinction between legitimate

review of the facts to be elicited and the illegitimate suggestions grafted upon the witness's memory. The lawyer so unmindful of his oath and the nobility of his profession and its ethics as to ignore this distinction is a rarity, although the public is not as aware as it should be of how rare a specimen he is. Suffice it to say that even apart from the high character which is the customary equipment of every competent trial lawyer, unethical practices are simply bad trial tactics and bear their own punishment. For when the truth is tampered with, a thousand unknown facts spring to life to bedevil the culprit. When I am faced with a dishonest witness I am most confident of winning. For if I am properly prepared, such a witness cannot survive—and when he falls, the jury's contempt for him makes his fall fatal. A jury will often overlook a mistake, but never a deliberate lie.

Now, suppose that you have carefully reviewed with the witness his direct testimony. What else is necessary? Why, you must prepare him for cross-examination. That is a field which I am afraid a good many of us completely overlook, or at least underestimate.

Once more, remember the panicky position of the witness placed suddenly on the witness stand and asked to fence with a trained, carefully prepared adversary on cross-examination. I say every witness should be subjected in advance to a drill in thorough cross-examination. Of course, you know what the other attorney is likely to ask. You know of some documents in the case which will be used against you. You know that perhaps the last paragraph of a certain letter refutes the point the cross-examiner will wish to make. But will your witness be confused? Will he utilize the last paragraph?

You must train him in your office. I would say: "From now on I am your enemy. I am preparing you for cross-examination." Lead him into traps, and show him why he has been lured into the traps unjustly.

That is proper preparation. It is essential preparation.

And incidentally, most witnesses do not understand the rules of evidence. How often do you see a witness confused because he testifies: "Then the man got very angry and walked out," and the lawyer says, "Objection. He has stated a conclusion." The judge says: "Sustained; strike out that statement." The witness does not know what the trouble is. If this happens in your office in the course of preparation, you explain to the witness that the law does not permit him to say "he got angry." That is a conclusion. He must state the facts from which he deduced the anger. Why does he think he was angry? "Well," he says, "he banged his fist on the table and said, 'I don't have to stand for that,' and walked out."

"Won't you please say that instead of 'angry'?" you caution him. He is a

better witness. He is telling the facts more vividly, and he is no longer going to be badgered by a lawyer or a judge. Similarly, a witness may not understand the nature of an objection. You know what happens to the word "agreed." It is objected to as a conclusion. He does not understand why it is that you cannot say "agreed." If the witness is prepared in advance he will not think the court room is caving in upon him because objections to his testimony have been sustained.

Assuming you have not opened the case too wide, that your star witnesses have gone off the stand unscathed, and that the defendant's witnesses are now upon the stand, I approach—and I shall be very brief about it—the subject of cross-examination, which, of course, is a subject upon which volumes can be written and have been written.

Most lawyers who will tell you of brilliant cross-examination will not confess this: We are entranced by a brilliant flash of insight which broke the witness, but the plain truth of the matter is, as brother to brother, that ninety-nine per cent of effective cross-examination is once more our old friend "thorough preparation," which places in your hands a written document with which to contradict the witness. That usually is the great gift of cross-examination.

However, there is an art in introducing the letter contradicting the witness' testimony. The novice will rush in. He will obtain the false statement and then quickly hurl the letter in the face of the witness. The witness, faced with it, very likely will seek to retrace his steps, and sometimes do it skillfully, and the effect is lost.

The mature trial counsel will utilize the letter for all it is worth. Having obtained the denial which he wishes, he will, perhaps, pretend that he is disappointed. He will ask that same question a few moments later, and again and again get a denial. And he will then phrase—and this requires preparation—he will then phrase a whole series of questions not directed at that particular point, but in which is incorporated the very fact which he is ready to contradict—each time getting closer and closer to the language in the written document which he possesses, until he has induced the witness to assert not once, but many times, the very fact from which ordinarily he might withdraw by saying it was a slip of the tongue. Each time he draws closer to the precise language which will contradict the witness, without making the witness aware of it, until finally, when the letter is sprung, the effect as compared with the other method is that, let us say, of atomic energy against a fire-cracker.

Is there opportunity for preparation in cross-examination? Endless opportunity.

In the first place, there is a field of cross-examination which is undramatic, uninspiring, certainly unobservable in its effectiveness upon the jury and the judge, who will sometimes think you are wasting time. But stick to your guns. If you have carefully prepared this kind of cross-examination, it is of great value. It is the kind of cross-examination which does not contradict anything, but which selects certain facts and dates which the witness may admit; as, for example, that there was correspondence or conversations between the parties in a certain month; nothing more, which the witness does not deny; in fact, does not see the purpose of denial, and, indeed, at times, considering it unimportant, he is led to conceding the point readily, but which answer, later utilized in summation, fortified by information other witnesses give, or which, when utilized on appeal to a higher court, would be an admission so strong that at least, with respect to probabilities, it undermines his other testimony.

That kind of cross-examination, which is really not cross at all, is the result of sitting down with your own testimony, knowing what your adversary is likely to testify to, and saying to yourself, "how many of the facts which I wish to establish can I get him to concede without his being aware of their import; such 'innocuous' facts as that he met the plaintiff many times during a certain year; that he corresponded with him at certain times; that there was a certain directors' meeting at which four or five directors were present," and so forth. His admissions may appear harmless, but, when joined with later testimony, may be more influential upon the jury than all the dramatic cross-examination which you may conduct.

There are other fertile areas for preparation of cross-examination. The plan of attack often determines the form of the question. Sometimes it is vital to obtain the admission of the witness in the first instance. You don't want the witness to contradict. You want any admission you can lead him into, rather than the advantage of contradiction. In such a situation the questions must be framed so as to induce the concession. Since leading questions are permitted in cross-examination, the form of the question, as well as the tone in which it is put, may push the witness towards admission.

Sometimes it is desirable to induce denial. You can destroy his credibility by leading him into denial of the fact and then contradict him. These various objectives, which must be carefully thought out, require different approaches.

And also what subjects you are going to examine him upon first and last is important. Often the very sequence determines the nature of cross-examination.

There is a negative rule about cross-examination upon which almost all

trial lawyers agree. Do not cross-examine aimlessly. Do not simply take the witness over his testimony in the hope of finding a crevice. His repetition, without any substantial contradiction, will only italicize the impression he may already have made. It is far better in such an instance to waive cross-examination and endeavor to minimize the effect of the testimony in summation. Fishing expeditions on cross-examination are almost always disastrous. A fisherman pulled into the water by his catch is an ungainly sight.

But if you have foreseen the testimony which will be given against you, and you have prepared one or two points on which the witness must yield, or which at least align probability against him, and you limit yourself to these, waiving the witness aside after you have made your limited inquiry, you may find that the cloud over one or two of his statements may also cast a shadow over the rest of his testimony.

It is difficult to formulate rules for spontaneous cross-examination—the factors of the witness' mannerisms, his temper, his evasion or undue assertiveness, his confusion, the jury's reactions to him (do they enjoy or sympathize with his plight)—all affect the persistence and method of the cross-examiner. Triphammer judgment must be used. Sometimes the "additional" question gives the witness a chance to retreat. Sometimes relentlessness brings the great and final reward. The psychological factors are numerous and intriguing.

Because of the late hour, I shall not endeavor to discuss these complicated matters and give illustrations of success and failure. It is a subject entitled to exclusive treatment.

I pass on to the subject of summation. I should like to suggest this to you. Obtain the minutes of the trial overnight, particularly in an important case, and during those early hours of the morning when your adversary is sleeping, cull out admissions, inadvertent statements, and categorize them. When summation time comes, generally, in a long case, you will at least have the evening to collate this material for final preparation. Then, in your summation, you can advise the jury, "In order to persuade you that there is no real controversy in this case, that the defendant concedes the justice of our position, I shall quote only from his testimony and from the testimony of his witnesses. I have the minutes of the trial here, ladies and gentlemen, the official minutes. I shall not quote my client. I shall quote only the words of the defendant." Then, if you have your points carefully categorized, you say concerning each point, "Let us see what the defendant said," turn quickly and read *haec verba* that particular admission. You are by cumulative effect

creating an impressive case, much more irresistible, I am sure, than the greatest eloquence applied to generalities.

The day is past when you can make mere emotional appeals. Emotion is futile when it is not based on sound fact and reason.

And one final thought with respect to summation. It is wise, if it is possible, to tie all the arguments together upon one strong point, so that they are not scattered. You can often gather them on the string of a single illustration.

Suppose that you claim that the defendant has not answered a single real issue and has simply attempted to escape by using all sorts of artifices. Well, it might be a good idea to put your pearls together on the following string: "There is a curious fact about an octopus. When an octopus is attacked he emits a cloudy fluid, and in the confusion he escapes. The defendant in this case used this method. Whenever he was in danger he emitted a cloudy fluid." Thereafter, every time you point out his evasive evidence you say: "Some more of that inky fluid by the octopus," and the jury is able to correlate your different arguments by the image which you have effected in their minds.

After summation, the lawyer must be ready to submit requests to charge to the presiding judge.

You know about the lawyer who said: "Your Honor, I am perfectly willing to waive summation."

His adversary said: "Your Honor, I am willing to waive summation, and the charge, too."

That privilege is not afforded you. It is therefore necessary to prepare the requests to charge. This must be done at the very last moment, or else they cannot be effective. They must be prepared in the light of the testimony which has developed in the course of the trial. That again means hard work and early hours. It is always wise, if it can be done, in order to aid the court, to have a Court of Appeals case, with perhaps one sentence from it which holds that a refusal to charge in a certain manner is error, or the making of a certain charge is error, and so, under each request you have authority succinctly stated to the court. I think any judge will appreciate such a series of requests.

Most people I know, while they believe in democracy, actually are very skeptical about mass judgment. They have unfavorable opinions about mass judgment. They will tell you that the average person who listens to the radio has a twelve-year-old intelligence. I happen to believe in the intrinsic good sense of mass judgment. I rely on it. If I had a difficult problem,

I would rather have the opinion of one hundred million than of the five greatest men. I really believe that in multiplying individual opinion you reduce the incident of error. And our jury system was framed on the wisdom of mass judgment. Here are twelve men and women of ordinary intelligence. A great many lawyers and judges have analyzed the correctness of jury decisions. Some judges have kept careful record of jury verdicts and written analyses based upon extensive experience. Lawyers will tell you that ninety-nine per cent of the time the jury is right, even though it may not select the right reason for being right. It does as most of us do in our ordinary experience. It forms a judgment first, watching people, listening to them, and then attempts to rationalize that judgment.

Therefore, the jury system is a magnificent system of attaining the truth, but only on the assumption that you have brought into the court room all the evidence necessary from which to derive the truth. That juries occasionally go wrong is often not the jury's fault. It is ours. The reason is that one attorney who may have the wrong side of the case has presented so much evidence, and the other side has defaulted with respect to so much contradiction of it, that the jury, subjected to that uneven ratio of evidence, has made a wrong decision. But it is the right decision on the evidence adduced.

Therefore, the responsibility imposed upon us is a very heavy one.

I conclude with this anecdote about Rufus Choate, who, as you know, was a charming and brilliant trial lawyer. On one occasion a leading citizen of the community happened to be on a jury before whom Rufus Choate represented a plaintiff. The juror knew of Choate's great reputation. He recited to a friend of his the experience he went through as a juror. He said, "I knew about Mr. Choate's skill and the way he charmed juries and could make them believe black was white. So I set myself against him and made up my mind not to permit him to play his tricks on me. And I did more than that. I advised all my associates on the jury to be on guard against Mr. Choate's devices. As a result, no matter what Mr. Choate did during that trial, although he tried every possible trick—they did not work."

And the friend said: "Well, were you unanimous against Mr. Choate's client?"

"Oh, no," he answered. "We decided for Mr. Choate's client, but that was only because all the facts and the law happened to be on his side."

If you are a skillful trial lawyer, it may appear to the jury that your adversary is your equal and even your superior. But it just so happens that the facts and the law are on your side.