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Recommended Citation

Harold R. Medina, *Trial Judge's Notes A Study in Judicial Administration*, 49 Cornell L. Rev. 1 (1963)
Available at: <http://scholarship.law.cornell.edu/clr/vol49/iss1/1>

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CORNELL LAW QUARTERLY

VOLUME 49

FALL, 1963

NUMBER 1

THE TRIAL JUDGE'S NOTES: A STUDY IN JUDICIAL ADMINISTRATION*

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One does not have to be a writer of script for the movies or television to know that practically every member of the community is interested in the judge who presides over a jury trial in a court of justice. These trial judges have such a variety of individual characteristics and they pursue the quest for truth and justice in so many different ways that they furnish material for countless works of fiction, such as Arthur Train's *Mr. Ephraim Tutt* stories. On this occasion, however, it seems fitting that we should pursue an inquiry into a more technical field, of special interest to the Bench and Bar. So we shall direct our attention to the trial judge as a craftsman. Years of training and experience in the techniques of the law should have developed certain skills in the exercise of the powers possessed by the person who presides over a trial. Moreover, it should not surprise us to find that the pure craftsmanship of the judge is a more effective instrument of justice than his sense of humor or his friendly ways.

What has seemingly escaped the notice of legal commentators is the subject of the trial judge's notes. There may be many reasons for this, including the almost universal feeling of judges that their notes are private and for their own use, not to be pried into by strangers or even by legal scholars. Strangely enough, as we shall see, some judges do not take the trouble to make notes during the progress of a trial, or to preserve them. As a good set of trial notes is a valuable set of tools to be used by our judicial craftsman as he exercises his powers as a trial judge, the preliminary part of this lecture will be devoted to a description of the various types of trial notes in common use by American and British judges. Menace Number One is the judge who thinks his memory is so good notes are a mere waste of time. And it is well to remember that

* This speech was given as the Frank Irvine Lecture at the Cornell Law School, Ithaca, New York on Wednesday Evening, May 1, 1963 (Law Day, U.S.A.).

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the development of every skill must start at scratch. The fortunate judges are those who in college and law school had already developed proficiency in separating the wheat from the chaff, in selecting and accurately noting what is important. It is obviously impossible to make a note of everything.

The day I was sworn in as a federal district judge one of the other judges, with whom I had been on friendly terms while we were practising lawyers, led me to his chambers to show me how he kept his trial notes. He pulled off the shelves several bound notebooks containing the notes he had made during a recent three-day trial. He was a most conscientious and meticulous man, and the notes were voluminous. Page after page digested the testimony of the various witnesses and described the contents of exhibits, the various motions and so on. This method has many advantages and some disadvantages. It is not possible to keep writing steadily and at the same time be alert to the maneuvers of counsel and other incidents in the courtroom.

One of the best trial judges, before whom I tried many a case in the old days, had worked as a stenographer in a law office before he was admitted to the bar. I was surprised and delighted by the brief and absolutely accurate versions he gave of the conflicting testimony in his instructions to juries. It was only later that I was privileged to look at some of his trial notes. They covered no more than four or five pages of foolscap for a single trial. Most of them were in longhand. But here and there were stenographic notes of the exact testimony on critical issues. Some judges use the sort of semi-shorthand that many of us develop in school taking notes.

The availability of a daily stenographic transcript changes the whole picture. While I have no available statistics, I have sat with other judges in many trial courtrooms over the country and have discussed the matter with a goodly number of trial judges. I believe the fact is that in the great majority of trials the court reporter never is called upon to transcribe the minutes of the trial. In what are called the "big" cases, both criminal and civil, and whether jury or nonjury trials, the court reporters work in shifts, and a copy of the minutes of each day of the trial is available to the court and to the lawyer or lawyers for each side by about nine o'clock in the evening, sometimes earlier. When I presided over the anti-trust case against the seventeen leading investment banking houses, lasting two and a half years, printed copies of each day's proceedings were delivered in the early evening of every day. The reason they were printed was the large number of lawyers and the general importance of the case.

I can not even estimate the number of copies ordered for delivery each day.

One of our most able judges makes skeleton notes at the trial and then dictates a more ample summary after studying the transcript. This is real work, including evenings and early morning hours before court convenes. But it means a wonderful set of notes.

Another judge keeps very brief, almost unintelligible notes while the trial is in progress and then dictates in chambers after the trial is recessed for the day.

In my own case, the notes of a single day seldom covered more than a page or two, kept in a loose-leaf binder; the handwriting is small; all witnesses, exhibits and motions are noted; and I occasionally signalled the reporter to mark a page of his stenographic notes so when a recess was taken I could write out the exact words used by a witness. I seldom read the minutes, even when they were available, except to check something about which I was in doubt. Exhibits are not noted on a separate page, so continuity is preserved and the sequence of witnesses and exhibits made it easier to find particular incidents. The loose-leaf system was indispensable to me, as I played with the notes after court adjourned for the day and sometimes inserted new pages with suggestions for instructions to the jury and for other purposes. Incidentally, this is what Horace used to do as he tells us in one of his Satires: "*ubi quid datur oti illudo chartis.*" "When I have a moment of leisure I play with my notes." Notes are made to be used. And so it is to be expected that literary people, architects, engineers, lawyers, judges, and everyone else will gradually get into this habit—if they make notes. And my trial notes of every trial over which I presided have been preserved.

The notes of one of our greatest judges, the late Learned Hand, exemplify yet another aspect of the trial judge's notes, and, I might add, of the trial judge himself. I am referring to the process of evolution or development. Over a period of fifteen years, his notes developed from a rather simple transcript-type rendition of the trial proceedings, to a highly refined instrument of judicial craftsmanship. Judge Hand sat as a trial judge in the United States District Court for the Southern District of New York from November, 1909 through October, 1924. There are twenty-five volumes of these trial notes, the first twenty bound, the last five loose-leaf. They are in his own handwriting, and are now with Judge Hand's other papers in the Manuscript Division of the Library of Congress. As fully developed these notes not only indicate the laborious process of consistently setting forth the testimony and exhibits adduced at the trial; but are replete with diagrams of exhibits, summaries of

indictments and arguments of counsel in complicated cases, citations, comments pinpointing significant issues and points of law and evaluating the weight of evidence and credibility of witnesses, and miscellaneous other data which made these notes, more and more, a valuable working tool and the judge, more and more, a skilled judicial craftsman.

Recently, through the courtesy of the Secretary of the Lord Chancellor's Department, I had occasion to examine the trial notes of one of the British judges, sitting at Queen's Bench, in two cases—one criminal, the other a negligence suit. The distinguishing feature is the extraordinarily clear and compact summary of the testimony. Except that this is done in a series of separate lines, rather than in short paragraphs, this method is very similar to that of Judge Hand.

So, keeping trial notes is just like everything else in life. No two people are alike and there is no one particular method to be followed. Everything depends on the way each judge does his work and upon his capacities and characteristics.

I put to one side the many interesting questions as to the origin and special function of the trial judge's note taking at common law. Under the modern practice court reporters make a stenographic record of every word spoken by those participating in the trial, except where some colloquy takes place "off the record" by order of the judge. The judge's trial notes need no longer constitute the basis for the bill of exceptions, which was the vehicle for an appeal at common law. The clerk of the lower court now normally takes care of the task of preparing the record, although we may note that the trial judge may be called upon to settle conflicts where the accuracy of a record is called into question.

So too, it is worth noting that an accurate set of judge's trial notes may be invaluable in those disturbing cases where the court stenographer has died or is incapacitated and for some reason his notes are wholly or partly undecipherable. As exemplified in the celebrated *Chessman* case, and with necessary variations depending on statutes, court rules, or decisions in particular jurisdictions, the rule that seems to be developing is that if a substantially equivalent record can be made so that the appealing party is given a fair opportunity to present his points, the ordinary course of justice will not be impeded by such peculiar misfortunes. Although a trial judge should not be burdened with the necessity of keeping an elaborate trial record, a good set of judge's trial notes may, in a proper case, prove of great value in establishing such a substantially equivalent record.

But the aspect of the trial judge's notes which I wish to concentrate on in this lecture, concerns what I have referred to as the craftsman-

ship of the judicial office. The great desideratum is a combination of observation of detail and an over-all general view of the matter in hand. The trial judge must be paying attention to what is going on every minute of the time the trial is in progress. Keeping careful and accurate notes helps him to do this.

One of my most vivid recollections is of the time I was a clerk in one of the large law firms in New York City. One day I was sent up to the County Courthouse to have an order signed by Judge X. He was presiding over a jury trial and the clerk told me to wait until the judge found a convenient time to sign the order. So I sat down and watched the proceedings. The judge was quite busy. Every once in a while some more or less distinguished visitor would step up to the bench and shake hands with the judge. The lawyers trying the case indicated a desire to pause, but the judge said: "No, no, go right ahead." At times he seemed to be writing in a book on the bench in front of him. Finally, I was told to go up and present my order for signature. He read it over, without interrupting the progress of the trial, signed it, and handed it back to me. While he was reading it, I was looking at the book on the bench. Had he been keeping careful notes? Not at all. He was just doodling, a few outlines of birds, faces, and so on.

Now, I haven't the slightest doubt that, if someone had asked Judge X, he would have insisted he had not missed a word of what was going on at the trial. This is just like the appellate judge who sits there reading one of the briefs while counsel is making an oral argument, and then insists he can read briefs and listen to arguments at the same time without missing anything.

The result of inattention is that the judge thinks every case is just a simple little case, even though his ideas about it are foggy. He may miss all the fine points, and he may wind up giving the jury an absolutely colorless charge. As a matter of fact, there is no such thing as a "little" case. Every case is important to the litigants and every case is interesting if only one has the will to make a sincere effort to understand what the lawyers are trying to do.

It is well at this point to insert a caveat. We judges must try not to become pompous or stuffy, or too serious. The golden mean of Horace is a pretty good rule to follow, with the judge's trial notes as with all other human activities. He tells us in one of his Satires: "*quid vetat ridentem dicere verum?*" "What is to prevent our saying something serious with a smile?" Horace sings this same refrain of profit and pleasure in a number of different ways. Even the most devoted of judges may relieve himself

from the sheer tedium of the moment by indulging in figures, faces, random letters, words and phrases, and the myriad other subjects of the doodle. As a matter of fact, going a little further, at least one of the uses of the judge's trial notes may well be as a sort of pacifier for the judge who is so enamored of his own wit that he can not resist the impulse to hurl oral barbs at counsel who has unwittingly fallen into disfavor. Or, to take another illustration, the overly-aggressive judge who is constantly interfering in the conduct of the trial, may perhaps be persuaded to work off steam by a similar process of doodling. A sense of humor is a pearl without price and so is a sense of propriety and restraint.

Under those bushy eyebrows the twinkle in Judge Hand's eyes was plainly visible, even when he seemed stern and awesome; and this twinkle is reflected again and again in the marginalia of his trial notes. Here and there are animals, strangely reminiscent of the papier-mache gilded idols carried in the processions at the Metropolitan Opera House in New York City in the good old days. A bust with curly whiskers may be his friend Aristotle for aught I know. The Greek, or supposedly Greek, phrases are delicious. When he hears a particularly breezy prevarication by a witness he is apt to write in Greek capitals an abbreviated declension of the Greek word for wind—

ΠΙΝΕΥΜΑΣ¹

ΠΙΝΕΥΜΑΤΟΣ

ΠΙΝΕΥΜΑΤΑ

as though he were whispering to himself "wind, of the wind, winds." The most beguiling of the lot is a line in German, topped by what might be a quotation in Greek of something said by one of Homer's heroes. This is how the two appear in the margin of one of the pages of Judge Hand's trial notes:

ΑΧΦΙΦΥΝ

ΔΕΡΣΟΕΝ

ΙΣΤΑΙΕ

ΦΡΥΑΙΓΓ

ΤΣΕΙΤ

Ach wie wunderschön ist die Frühling Zeit.

The German is easy—Oh, how beautiful is the Springtime! But how about the Greek? Is it something from Homer, or Aristotle? I got out my Greek dictionary, tried every combination I could think of, and was completely stumped. Then I summoned my good friend Judge Edward J. Dimock into consultation and we puzzled and puzzled. Suddenly that ΣΟΕΝ attracted our attention, and then the ΣΕΙΤ at the end, and we

¹ The sigma was doubtless added inadvertently.

had the answer. It wasn't Greek at all, but the German written in Greek capitals. Thus:

AX (ach) ΦΙ (wie) ΦΤΝΔΕΡΣΟΕΝ
 (wunderschön) ΙΣΤ (ist) ΔΙΕ (die)
 ΦΡΥΛΙΓΓΤΣΕΙΤ (Frühling Zeit)

To those who knew Judge Hand intimately one of his many attractive traits of character was his playfulness. Sometimes, and not too many years ago, he would skip about his chambers, sometimes he sang snatches of Gilbert and Sullivan, but always he was his own dear self. The unexpected was what he particularly loved, especially if he was himself doing what was least expected at the moment. And so we find the man reflected in the trial notes of the great judge.

To return to judicial craftsmanship, one of the principal functions of a trial judge is to be at all times in control of the trial. His notes will help him to do this. Various factors work against control by the judge. Some lawyers have strong personalities. They are magnetic and forceful. If the judge is not on the alert, he may find that one or both of the lawyers are running the trial. If one of these individuals is given his head, he will take over the trial and get such momentum running in his favor that a favorable verdict is more or less inevitable. If there is some dispute over what a witness said, it is easy for the judge to say "the jury will remember"; and the type of lawyer under discussion will go sailing ahead under a full head of steam. A good set of notes will make it possible for the judge to tell the jury what the witness said and keep them on the track. When matters seem to be getting out of hand, the judge may give preliminary or interim instructions to the jury, explaining what the issues are.

Perhaps the greatest enemies of justice in jury trials are confusion and irrelevancies. Some lawyers and some witnesses have a genius for spreading confusion broadcast. It is often impossible to know whether this is done by design or because some people naturally leap from one subject to another and never come to rest on any point long enough for the other participants in the trial to concentrate on it. If a lawyer has a weak case with a certain emotional appeal, it may seem to be good strategy to throw the whole trial into a state of chaos, with a continual barrage of objections and disputes over what was said or was not said. I had a perfect example of this in the trial of the eleven Communist leaders. Witnesses for the defense, under the guise of denying certain conversations testified by prosecution witnesses, showed a disposition to roam at will over the usual lines of Communist prop-

agenda. References to my notes made it possible to pinpoint the date, the occasion, who was present, and who was supposed to have said this or that. This reduced the amount of endless quibbling and compelled an orderly statement by the witness.

Few lawyers or judges will fail to agree that the most important function of the trial judge is what the British call the judge's "summing up," and what we Americans call the judge's "charge" or his "instructions" to the jury. Good, comprehensive, but not voluminous notes are almost indispensable if the instructions are to serve their purpose. And this purpose is to assist the jurors to perform their function intelligently.

If the notes are properly kept and properly studied and elaborated upon from time to time during the progress of the trial, there should gradually emerge a perfectly clear tabulation of the issues of law and fact in the case. Every case is governed by certain principles of law. These are not absorbed by some process of osmosis when sitting on the bench. They are come upon by a study of the law books, supplemented by some good hard thinking. Once these rules are clearly stated, the questions of fact stick out like sore thumbs. It is not a bad habit for the judge to tabulate for his own use a set of interrogatories of fact, even if he does not intend to submit written interrogatories to the jury, but rather to ask for the usual general verdict. In his analysis the trial judge may put himself in the position of a federal judge in a diversity case. This will keep his mind on the law of the particular jurisdiction that controls the case, which may or may not be that of the state in which the trial is held.

If the loose-leaf notebook method is followed, interleaves inserted as the trial progresses will indicate tentative conclusions with respect to the decisive principles of law and the separate issues of fact in the case. Thus the final instructions will gradually evolve as the case proceeds.

One of the worst things the trial judge can do is to join together an interminable set of platitudes about burden of proof, credibility of witnesses, the functions of judge and jury, circumstantial evidence, inferences of fact, the importance of listening to the views of other jurors, and so on, with a sample charge tacked on at the end, selected from a book of forms for instructions in contract cases, or negligence cases or others, with a sprinkling of patriotic sentiments. Not only does this give the jury little or no assistance; it provokes a welter of requests for further instructions, and is a great breeder of the very appeals the judge may be trying to avoid. To make the matter worse,

in some jurisdictions such as New York, it is common practice to receive oral requests to charge in the presence of the jury. To a long sequence of complicated requests all the jury hears the judge say is "Denied," or "So charged," and they can have little or no understanding of the instruction thus given. It is surprising that this absurd practice has become so firmly imbedded in New York trial procedure. One would suppose the only sensible way to proceed would be to have such discussion in chambers in the absence of the jury, upon the request of any party to the case, as is provided in the federal rules. Then the judge can return to the bench and make a clear statement to the jury containing such supplemental instructions as he may deem necessary. Indeed, while not the universal rule in federal courts, many require the submission of requests in writing a reasonable time before the conclusion of the testimony; and the submission of oral requests in the absence of the jury is only allowed in the event of some unexpected or ambiguous statement or omission in the instructions in chief, or for some other reason.

The foundations of all good charges to juries are: (1) A fair and adequate summary of the conflicting versions of the facts as given by the witnesses for plaintiff and defendant. This need not be lengthy, but it must be accurate. In the federal courts the trial judge may also comment on the evidence, so long as he makes it clear that the jury is to do the deciding. This is one of the most significant of the common law powers of the trial judge. (2) A full and comprehensive statement of the rules of law governing the case and the issues of fact the jury has to determine.

If these two matters are properly handled, the instructions, insofar as they relate to the issues of law and fact, will be complete; additional instructions become superfluous. This will take care of those interminable, repetitious, and sometimes tricky requests to charge that are often orally presented in New York for the rulings of the trial judge in the presence of the jury. The judge may deny them all except as covered in the main charge. One of the most insidious practices, in this connection, is to include, as requests to charge, quotations from opinions of appellate courts, with a notation of the page number of the reports from which the quotation is taken, to impress the judge with the sterling quality of the request. This practice has been frequently condemned, as such statements were never intended to be used as instructions to juries and the phraseology is often argumentative or misleading when applied to facts different from those in the case from which the quotation is taken.

In order to tailor the instructions to the particular case before the judge, it is often desirable if not necessary to add a third category (3) to the basic requirements (1) and (2) just referred to above. Where digressions, irrelevancies, or various shows put on by the lawyers seem likely to divert the minds of the jurors from the basic issues, the trial judge should give some clarifying charge on the subject. One way to do this, if plaintiff sues for damages for breach of an oral contract, for example, is to tell the jury first to decide the fact of whether or not the alleged oral contract was made. There are all sorts of combinations and permutations. Often specific and somewhat detailed instructions are called for relative to the burden of proof, credibility, and other matters. But it is the duty of the trial judge to run the trial. If he does not, there will always be some lawyer ready, willing, and able to run it for him.

Now, this sort of close application to the task of being a trial judge means hard, continuous work, in court and in chambers and often during the evenings at home. But the by-products are noteworthy. For example, in nonjury cases it has been more or less customary to allow weeks or sometimes months for the exchange of briefs after the court reporter has transcribed the minutes of the trial. By the time the judge gets back to the case he has forgotten all about it. If, on the other hand, he intends to follow the case assiduously and keep careful notes, there is nothing to prevent his informing counsel at the very beginning of the trial that he will welcome briefs from time to time during the trial, if any party wishes to submit them, providing a copy is furnished to the other side, and that at the conclusion of the trial he will hear oral argument and then decide the case at once, or as soon as he has given it sufficient consideration, without any further briefs, unless he should decide to ask for them. Of course, it is not practical to follow this procedure if the involved and complicated character of the case makes it indispensable to have the transcript written up and detailed briefs submitted. The cost of a daily copy of the minutes is generally prohibitive. On the other hand, it is surprising how often it is quite feasible to hear extended oral argument and then dictate the opinion and findings. The very saving of the expense of having the minutes transcribed is an item of no small consequence.

Now, what does this all add up to? It is a sound principle of judicial administration that good trial judges are the most vital part of the judicial establishment. It was the Jacksonian view that the functions of the judge should be circumscribed and his common-law powers curtailed. The baleful effects of this debasement of the judiciary are

still felt in many parts of the country, in the elective system of selecting judges, short terms of office, and lack of retirement pay. The American Bar Association Section of Judicial Administration reported in 1961 that about three-fourths of the states still keep the judge from including in his instructions any comments on the evidence; half bar even a summary of the evidence; a third require that the charge be delivered prior to the summations of counsel; and some still insist that the court only grant or accept instructions prepared and submitted by counsel. By the federal rules the principal common-law powers of the trial judge are preserved intact. The thesis of this lecture is that these powers are salutary and can only be exercised as they should be if the judge studies persistently to perfect the craftsmanship of his office. One of the best ways to do this is to develop the habit of keeping good trial notes.