THE "WHY" AND SOME OF THE "HOW"

ANNALS OF JUSTICE

By Steve LaCheen

Almost everyone knows that the question most often asked of criminal defense lawyers is the "how" question - "How can you defend a person you know is guilty?" And we know the stock answer, which addresses the word "know" and focuses on Constitutional rights and the differing roles of prosecutor, defense counsel, and the Court.

But there is a different "most often" question posed to attorneys in general, "When did you decide to become a lawyer?" Over the years, I have been asked that question hundreds of times, and answered it the same way every time: I decided I wanted to be a lawyer (although I did not use the word and probably did not even know it) when my first grade public school teacher Ms. Pizer, read us the story of the dialogue between God and Moses in which Moses attempts to beg off God's assignment that he implore Pharaoh to "let my people go," claiming that his speech impediment would render his presentation inarticulate and, therefore, ineffective. God, however, insisting upon Moses' obligation to make the pitch, tells him he will send Aaron with Moses to speak for Moses if necessary, and, besides, God will provide Moses with the words that will turn the Pharaoh's heart.

Somehow, that story and how it resonated in my five-year-old brain sent me home with a message that every parent wants to hear, and is so often afraid to hear: "I know what I want to be (read "do") when I grow up." In my case, I responded to the follow-up "What?" was (as I was reminded many times in later life) that I wanted to speak for those who could not speak for themselves.

My mother always claimed that her response was something to the following effect: "That's wonderful Stevie, but could you stop talking out of turn in class? Miss Pizer says you never stop talking." Truth be told, every report card I ever received in grammar (later grade and now elementary) school, graded my "Comportment in Class" with an "X" (unsatisfactory), for talking all the time in class and not being able to sit still.

The solution back then ("in the day," as we now refer to the past), before the development of the diagnosis of ADD, and the killer-cure of Ritalin - and the even later realization that just plain boredom can produce the same reaction - the solution was to "skip" me. And, they did; not once, but several times. But that is another story; it is not this story. This story is about the perceived "tricks of the trade," so to speak, by which I mean the kinds of legal pyrotechnics great lawyers are reputed to have pulled off in court which became the trademarks of their brilliant careers. See, the biographies of Lincoln, Darrow, Leibowitz, Nizer, Belli, et al, for appropriate models.

References to local legal luminaries in that class would include Lemuel Scofield, Tom McBride, John Patrick Walsh, Garfield Levy, Cecil B. Moore, and, of course, Dick Sprague.

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As a young lawyer, even younger than most of my peers, I knew that I could never be the equivalent of the flashy baseball star who caught the ball with one hand; in other words, someone who put the stamp of his definitive personality on every case. So, I adopted the opposite affect, and decided to let my words "do the talking," without attempting to make them more effective by the preliminary conveyance of the particular outsize image of Criminal Defense Lawyer.

The affect I chose to adopt was the very opposite of the stereotypical criminal defense as either flashy orator, on the one hand, or the scholarly "nerd" on the other. My avatar was the chameleon; it would be the individual case itself that would dictate my approach and my performance in the courtroom, not the other way round. And, many years later, I heard Al Pacino give that very advice to Keanu Reeves as his young mentee in "The Devil's Advocate," in the following more succinct expression, delivered with arms outstretched, side to side, "Hoo-hah! Never let them see you coming!"

So, how does a "chameleon" employ the element of surprise without being seen as a trickster? A few examples seem in order:

The answer for me, was quite simple; that is, never to do what would be seen as "pulling off" a trick, or stunt performance, but to create an impression early on that would be able to be used - an apparent after-thought - as concrete, or at least visual, demonstrative evidence supporting a particular argument.

The earliest example I recall was an occasion when I was still in my twenties. Before entering the courtroom where the panel of venire-persons from which the petit jury would be selected had been seated for voir dire, I handed my briefcase to my client - a well-dressed, well-groomed man, ten or twenty-years older than I - so the panel's first glimpse of us did not clearly identify which of us was the client and which the lawyer. That allowed me to suggest to the jury in closing argument that they should to the extent possible not consider my client's location in the defendant's chair as evidence of wrongdoing on his part. "Appearances can be deceiving," I said. "Remember when you first saw us walk into the courtroom you couldn't tell who was who from our appearances. Well, the chair in which my client has been seated in this courtroom is not evidence against him and does not make up for the Government's lack of proof."

Whether and to what extent that maneuver ever "worked" or not, I never knew, because even jurors who returned a not guilty verdict were reluctant to discuss the finer points and generally offered the most simple generalized explanation for their verdict, usually echoing something in the judge's charge.

I "employed" a similar subliminal demonstration in a prosecution brought by the Federal Drug Administration against a generic drug company accused by a disgruntled former employee who claimed that whenever a batch of finished product proved to be unfinished, the pills were simply pulverized and reprocessed, a violation of FDA regulations. What made the defense a little difficult was the fact that the company had pled guilty in a deal which allowed the executives to avoid prosecution in favor of charging four employees, who were dubbed "supervisors" of the line employees who performed the actual roll-overs.

What was unusual about the case was the fact that the four defendants were all East Indian, and spoke Hindi, and the accuser was Pakistani who spoke Urdu. At some point, the trial, which took several months, took on a circus-like atmosphere involving repeated interruptions because of accusations by an interpreter for the defense that the interpreter for the government was not properly translating a witness' testimony. That part of the story will wait for another day; this is about the quiet stratagem I adopted, which, as it turned out, was a significant factor in my client's acquittal.

My client, accused of being a supervisor, but really was not, was not going to testify in his own defense because he did not want to say anything that might incriminate the others. I certainly wasn't going to try to get the informant to admit he was lying about that without the evidence to confront him on that score; so I decided to try to communicate to the jury that my client was just another of the line employees following the orders of others, which would enable me to later argue lack of mens rea on his part. The simple stratagem I employed was to suggest to my client to simply stand up every time his name was mentioned. By the end of the first week, I think the jury got the message, and my client received the only not guilty verdict. Two defendants were convicted, and the jury hung on the fourth.

A similar stratagem may have played a small part in achieving a not guilty verdict in a nine-defendant drug case, in which my client who had been the Captain of the yacht in which the former drug kingpin-turned-government-chief-witness transported illegal controlled substances from the Bahamas to Miami. My client had decided he would not testify, as much because he felt he would not be believed as for not wanting to be an unintentional witness against any of his co-defendants. I knew that I could get the informant to admit that my client, a Polish immigrant, barely spoke English, but, out of concern for a response I had no way of controlling, I decided on another avenue of approach. I asked the Court to have my client re-arraigned in the presence of the jury since, even though he might decide not to testify, he had the right to have the jury hear him deny the charges.

The Court, although somewhat grudgingly, then suggested that the other defendants had the same right, and all were re-arraigned. The other eight defendants spoke perfect English. My client had to have several questions repeated for him by me, and then, completely on his own, said "Not guilty, on the lives of my parents, Your Honor," in a Polish accent so thick you could almost smell the kielbasa and beer, so much so that the judge had to ask that it be "translated for the record, which, of course, was an invitation for the Court's Deputy Clerk to repeat my client's words, "Not guilty, Your Honor."

That incident and the fact that my client wore his Captain's cap

to the courthouse every day, where he was observed by jurors in the hallway and at counsel table, conveyed, or so I believed, that he was a dedicated seafarer whose attention would be focused on his ship and his crew, and not knowingly expose either to the risks inherent in criminal conduct. Again, it was the unspoken message in the mis-en-scene of the courtroom that, like giving CPR to a dead man, might have not have helped, but it didn't hurt.

I could provide other examples of the same, or at least similar, efforts to create a subliminal message to give the jury a different view of my client than the government's portrayal of him, but I want to touch upon another way in which I tried to level the playing field by an unspoken demonstration which I hoped would encourage a jury to see there was always the possibility of another version of the one-sided version of events portrayed by the prosecution; that there was always the possibility of a non-criminal explanation.

One of the ways in which I attempted to level the playing field was to try to hold on to potential jurors on the venire panel those whose information or answers provided a clue that they were persons capable of, and willing to act on their capability to see that there were almost always "two sides to any story," and to apply that concept to the government's evidence in the case before them. It was for that reason and based upon that belief that I preferred as jurors people who had enjoyed or suffered great upheaval or change in their lives - immigration, divorce, handicap, prejudice, etc. - anything that would give me a clue that they had the experienced life "from both sides now," as Joni Mitchell wrote. I always preferred the androgynous and/or creative person who was engaged in a non-gender-specific occupation, preferably one which did not involve simply taking orders from a superior. I wanted jurors who would feel a sense of responsibility for my client, and be willing to exercise independent judgment in deciding how to resolve the conflict between the government's version of events and the differential between probability and proof beyond a reasonable doubt.

Another way I tried to convey the difference between the certainty and self-assurance displayed by the prosecution, was in the selection of court-room attire, Male prosecutors almost invariably dressed in the uniform of authority - dark blue suit, bright white shirt, and red tie - the colors of patriotism, love of country and righteous indignation. Many defense lawyers dressed the same way, to balance the scale, in a way. I chose a different tack, and always wore neutral colors - taupe, brown, or gray suits, off-white shirt, and quietly colorful but muted tie - as another way of illustrating the difference between our respective roles - the prosecutor declaiming certainty and the defense suggesting the possibility of doubt. Did that ever mean anything in the long run? I cannot say for certain, but I do remember that the wife a local judge - whom I did not strike because I was sure she would end up explaining reasonable doubt to the jury - did tell me, when I bumped into her at a bar association event some months later, that the reason several of the jurors gave for giving my client the benefit of a doubt with an acquittal was that, if he had really been a successful thief, he would have been able to afford a lawyer who could afford to dress better!

There are, of course, various other ways to convey the viability to a jury that a sense of doubt may be the appropriate response to the government's insistence on certain guilt, but they are already the proper subject of numerous books by numerous experts, which I am not. The only advice I would ever venture to give on that score would be that it is almost always more important to listen for what a witness does not say than what he does say, even the way in which witnesses for the prosecution almost always repeat the cross-examiner's question when they are uncertain as to the exact words to satisfy the prosecution's expectations. Jurors apparently appreciate the significance of the fact that the witness did not have to have the questions repeated on direct examination, only on cross. And I found the best way to bring that point home to, and preserve its value for final argument, was to counter to the witness' repeat of my question with the following quick response: "I asked you first," which almost always drew a laugh from the jury, and once even a giggle from the bench - as a comment upon the witness' needing time to think up an appropriate answer rather than to simply answer truthfully.

I will stop here, as I like the idea of ending with a laugh. ■

Steve LaCheen (slacheen@concentric.net), a partner with LaCheen, Wittels & Greenberg, is a member of the Editorial Board of The Philadelphia Lawyer.

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