

Tuesday, October 24, 2006

Judges lay some cards on the table at criminal defense seminar; treading carefully with press coverage.

This follows up on my October 22, 2006 blog entry about my speaking on a panel of criminal defense lawyers and judges at the Maryland Trial Lawyers Association's October 23 seminar entitled "Successful Strategies for Circuit Court Criminal Cases." I spoke about trial techniques, opening statements, direct and cross examination, and immigration consequences of criminal convictions and sentences. I focused on using consultants to prepare for trial (my favorites are psychodramatist Don Clarkson and acting consultant Josh Karton); being in the moment at every step of the trial (I start with the lessons of t'ai chi) so that the opening statement, cross and closing often are quite different than the outlined arguments and are seamlessly integrated; persuading through storytelling at every stage of the trial; and protecting non-citizen defendants from the complex of immigration landmines from criminal convictions. Also on the panel were Circuit Court judges from Baltimore City, Baltimore County, and Anne Arundel County; and two additional criminal defense lawyers discussing case preparation through the jury selection stage; and jury instructions, closing arguments and sentencing. One of the panel's criminal defense lawyers talked about dealing with the press and asserted potential publicity benefits to the lawyer from such news coverage. My view is to tread very carefully when discussing one's criminal defense clients with the press. Newspeople have their own agenda (and hopefully that is for the truth) that is separate from the defendant's interests, and are on tight deadlines that can interfere with giving an accurate picture of the defendant's case. While at first blush the lawyer may feel it important to talk with the press to help get the defendant's side across, once the trial is underway, the jury is not supposed to be following news of the case in the first place. Moreover, journalists have plenty of criminal defense lawyer talking heads available who have no involvement in the case. Through Marks & Katz's in-depth experience talking with the press (more often as talking heads, rather than about particular clients), we have developed a sense of when to talk on the record, and when not to. We make ourselves freely available to provide legal analysis and views to the press for cases and issues that we are not directly handling. When the press calls about a client, however, our sole obligation is to our client (and not to get attention to our law firm), which often limits the extent to which we will talk on the record to the press. Just as the pause in a song can be as important as the note that is played, knowing what to say and what not to say to the press can be equally as important. Consequently, when a lawyer is eager to talk to the press about a client with the hope of gaining publicity, that may be all the more reason not to speak with the press much or at all, or to keep the discussion off the record (and to verify that the journalist has agreed to keep the discussion off the record). Moreover, a journalist should not automatically be trusted, as they are humans, fallible, and competing against the 24/7 never-ending churning of news stories online and off. Additionally, beware when journalists try to create a soundbite by a lengthy yes/no question. Such a question is the journalist's soundbite, at best, and not the interviewee's words. Many of the three Circuit Court judges' comments were candid and very relevant to criminal defense lawyers. That was quite a change of pace from a talk earlier this year by a District of Columbia appellate judge who was advertised as bringing an inside view from the court, and instead talked plenty from an inside view of the physical renovation of the court's new digs; that is not the type of insider's view I had in mind when I went downtown to hear this judge. The judges all agreed that they generally limit jury selection to judge-directed voir dire that eliminates proposed questions that address jurors' potential discomfort with such critical concepts as the necessity to acquit absent a unanimous reasonable doubt finding. Jurors should not be permitted to wait until jury instructions to realize they cannot follow such a critical instruction; by that time, they are more likely to remain silent on the matter, and a mistrial will be more possible if jurors do speak out at that stage, unless a sufficient number of alternate jurors remain. The judges expected that more potential jurors will lie to stay off a jury than to stay on a jury. However, I believe that plenty of potential jurors lie to get onto a jury, particularly for trials that seem particularly interesting or high-profile (perhaps sometimes hoping to be able to sell the juror's story to a writer after the trial concludes). One of the judges surmised that potential jurors are no more likely to lie to a judge conducting voir dire than parties' lawyers conducting voir dire. However, I pointed out Dr. Sunwolf's groundbreaking treatises convincingly showing how harmful juror biases are more likely to be revealed through lawyer-directed voir dire. Potential jurors are less likely to admit an inability to follow a judge's instructions when speaking to the authority-figure judge, sitting in an elevated position, than making such admissions to a mere mortal lawyer. I encouraged the judges to permit at least limited lawyer-conducted voir dire (e.g., five-minutes' worth or more) and jury questionnaires to make up for the lack of lawyer-directed voir dire. All three judges expressed concern for potential adverse immigration consequences to non-citizen defendants. One of the judges will sometimes encourage the parties to reach a case disposition that will reduce such adverse consequences. Judicial training conferences include presentations by immigration judges and government immigration lawyers. Immigrant-side lawyers are needed, as well, at such training; I will check out the situation. The Baltimore City judge suggested that lawyers encourage legislators to increase resources in order to have more judges, prosecutors, and public defender lawyers available to handle the staggering backlog of criminal cases in that courthouse, which often leaves criminal defendants waiting well over a year to go to

trial. After the program, I suggested to the judge my preferred alternative of reforming the laws (e.g., drug laws) so that the number of prosecutions will be reduced in the first place. I give the judge -- a former federal prosecutor -- credit for not waving off my comment as merely coming from a radical lawyer. Instead, she spoke of prosecutors' ability to reach such a goal through their criminal charging decisions, and also talked about a gap that often arises between police aggressively arresting and charging crimes on the one hand, and prosecutors finding alternatives to going to the mat on every single case. One of the judges encouraged lawyers, for guilty pleas and not guilty pleas on agreed statements of facts, to keep out factual allegations from the record that would not be admissible at trial. He also encouraged lawyers to seek judicial intervention to edit such allegations out of presentence investigation reports, lest such allegations come back to haunt the defendant during parole consideration time. He also addressed the very important option of not seeking a presentence investigation report for sentencing in the first place; if a defense lawyer wants a sentencing hearing separately from the trial date, this judge is flexible for doing so (e.g. to get sentencing witnesses to court, or if the lawyer is exhausted at the end of trial) without needing to obtain the delay through requesting a presentence investigation report, which often will contain information more harmful than helpful to a defendant. Another judge talked about a lawyer's risk of losing credibility with judges by asking for an unrealistically low sentence. My view is that it is critical to defend one client at a time rather than having such concerns about being seen as seeking an unrealistically low sentence. The same judge said that just as lawyers discuss judges, judges also talk amongst themselves about lawyers who appear before them; this sounds like ex parte judge-judge communications. Speaking of ex parte communications, perhaps even deeper and vaster candor will shine from judges' seminar discussions when the audience is populated both by criminal defense lawyers and prosecutors in the audience, rather than one or the other. Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00