Circuitous Thinking

LET THE SECOND CIRCUIT MAKE YOU A BETTER TRIAL LAWYER

by Richard Ware Levitt

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I've long thought that all trial lawyers should start their careers as appellate lawyers and all appellate lawyers should begin their professional lives as trial lawyers. The reasons are obvious: Trial lawyers need to know the law and how to preserve issues for appeal, and appellate lawyers need to understand the realities of the courtroom.

So what can trial lawyers learn from Second Circuit decisions that might actually affect the outcome of their next trial? Plenty. Here are a few ideas:

DISCOVERY

Notwithstanding some disappointing *Brady* decisions – *United States v. Coppa*, 267 F.3d 132 (2d Cir. 2001) (granting mandamus in government's favor and applying result-affecting test of *Kyles v. Whitley*, 514 U.S. 419 (1995)) leaps to mind – the Second Circuit has reversed several convictions for *Brady* violations, and has emphasized that prosecutors are expected to be aware of evidence in the hands of investigators, who are part of the "prosecution team." *United States v. Gil*, 297 F.3d 93 (2d Cir. 2002) (*Brady* material was "suppressed" when turned over a day before trial as one of 2,700 pages of discovery). See also *Mendez v. Artuz*, 303 F.3d 411 (2d Cir. 2002) (affirming grant of habeas where prosecutor suppressed evidence that third party confessed to hiring hit man to kill victim, undermining evidence regarding description of defendant as shooter and motive for shooting). Additionally, "willful ignorance" of *Brady* material doesn't work any better for prosecutors than for defendants. See also *Leka v. Portuondo*, 257 F.3d 89 (2d Cir. July 12, 2001) (habeas granted where delayed disclosure of exculpatory eyewitness prejudiced defendant); *Boyette v. LeFevre*, 246 F.3d 76 (2d Cir. 2001) (defendant prejudiced by prosecutor's failure to disclose evidence suggesting an alternative perpetrator and impeaching testimony of complainant and another witness, in face of strong alibi defense).

Lesson: make pointed *Brady* demands, follow up with letters to the court and request *in camera* review of disputed documents. Additionally, keep in mind that many prosecutors when fulfilling their discovery obligations under *Brady* or otherwise must be "reminded" to review files prosecutors normally would not see, including "informant files" maintained by the FBI and DEA, as well as "209s" (internal FBI memos).

TRIAL PREPARATION

United States v. Saa, 859 F.2d 1067, 1074-75 (2d Cir. 1988), provides authority for asking the government to bring to court potential witnesses the government controls but does not intend to call at trial: "We believe that having the prosecution pass along to an informant a request by defendants that they be allowed to interview him is no substitute for permitting defense counsel to ask the informant themselves. Nevertheless, if the district judge was persuaded by the Government's assertions that [the witness] would be in danger if identified, a middle course could have been considered, such as having the Government produce [him] for an *in camera* meeting with defense counsel and the court." Some district judges have also been willing to ask government witnesses in open court, prior to their testimony, whether they would meet and speak with defense counsel.

TRIAL BY JUDGE OR JURY

We rarely even think about waiving a jury trial, and in federal court the government must consent to a trial without a jury. But statistics suggest, counter-intuitively, that all other things being equal you have a far greater chance of acquittal in a bench trial. Federal district court statistics for 2003 reflect 293 acquittals at trial by a judge and 327 convictions (47% acquittal rate), compared to 430 jury acquittals and 2,413 jury convictions (15% acquittal rate). Apropos of nothing, for those of you who are curious about whether more or fewer cases are being tried in the post-Guidelines era, consider this: in 1986 50,040 defendants were processed in the federal district courts of whom 6,710 (13.4%) went to trial. In 2003 83,530 were processed of whom 3,463 (4.1%) went to trial.

JURY SELECTION

The Second Circuit has granted new trials or ordered remands for further fact finding in numerous *Batson* cases during the last few years. See, e.g.,. *United States v. Thomas*, 320 F.3d 315 (2d Cir. 2002) (new trial); *Harris v. Kuhlmann*, 346 F.3d 330 (2d Cir. 2003) (remand); *Galarza v. Keane*, 252 F.3d 630 (2d Cir. 2001) (remand); *Jordan v. Lefevre*, 206 F.3d 196 (2d Cir. 2000) (new trial). Accordingly, *Batson* issues should be carefully considered and preserved. You should keep track of jurors' ethnicity, raise *Batson* issues as they occur, and renew them at the end of jury selection. Additionally, be aware that most grants of relief occur when the trial court fails to make the "step three" determination of whether the prosecutor's proffered reason for a challenged strike is credible. Be aware that a proffered reason for a strike may sound credible when made ("I don't want young people), but become suspect as voir dire continues and the prosecutor keeps young Caucasians on the jury.

CHALLENGES FOR CAUSE

Successfully challenging a potential juror for cause is usually a long shot, but doing so can be a critical part of jury selection, particularly in the post- 9-11 world. Traditionally, challenges for cause were available on only two theories: actual bias and presumed bias. In *United States v. Torres, 128 F.3d 38 (2d Cir. 1997)*, the Second Circuit added a third ground upon which to challenge for cause, "inferable bias." Inferable bias exists where "facts disclosed at voir dire indicate that a prospective juror has engaged in an activity closely akin to the conduct charged in the indictment against the defendant." Unfortunately, in Torres this new theory was used to uphold the government's challenge of a juror who admitted engaging in money laundering similar to the charged conduct.

IMPEACHING NON-WITNESS DECLARANTS AT TRIAL

Under Fed.R.Evid. 806 you may impeach a non-witness (i.e. hearsay) declarant as you would a witness. You are entitled to *Brady* material pertaining to such declarants, though your right to Jencks Act material is an open question. See *United States v. Jackson*, 345 F.3d 59 (2d Cir. 2003). You should, however, attempt to obtain Jencks Act material on these declarants, on the equitable theory that their hearsay testimony may be used by the jury as if the declarant were in court, yet is more difficult to rebut since the declarant is not available to be cross-examined.

USING COLLATERAL EVIDENCE TO CROSS-EXAMINE WITNESSES

A popular objection by prosecutors to efforts to impeach a government witness is that the impeachment is "collateral" or involves "extrinsic" proof. But is such impeachment always improper? No. It is true that Rule 608(b) precludes introduction of collateral evidence solely to impeach a witness's credibility. The Second Circuit has held, however, that "extrinsic proof tending to establish a reason to fabricate is never collateral and may not be excluded on that ground." *Justice v. Hoke*, 90 F.3d 43 (2d Cir. 1996).

CRAWFORD ISSUES

Objections based on *Crawford v. Washington,* 124 S.Ct. 1354 – prohibiting introduction of "testimonial hearsay" by non-testifying persons – are the Next Big Thing. The Second Circuit has yet to interpret *Crawford* as of this writing, but several decisions are in the pipeline. For now, the job of defense counsel is to object to the admission of any hearsay that appears to be "testimonial" in character – a description the outer limits of which the Court has not defined, but which includes, at least, post-arrest confessions, preliminary hearing testimony, grand jury testimony, plea allocutions, and testimony at a previous trial.

USE OF EXPERTS

You should scrutinize with care any "expert" testimony the government elicits through an agent ostensibly under Rules 702 and 703, because testimony that may properly be admitted under these rules is often interspersed with opinion testimony not requiring any specialized expertise and which is therefore not admissible under this (or any other) theory. The Circuit has criticized the government and/or reversed convictions where government agents assumed dual roles as fact witness and expert witness, and gave opinion testimony regarding matters not properly subject to expert testimony. E.g., *United States v. Cruz*, 363 F.3d 187 (2d Cir. 2004) (reversing drug conviction where agent interpreted defendant's post-arrest statement -- that his job was to "watch" another's "back" -- to be referencing the role of "lookout" in a drug transaction); *United States. v. Dukajini,* 326 F.3d 45 (2d Cir. 2003) (criticizing "expert" testimony of case agent interpreting non-coded conversations).

LAY OPINION TESTIMONY

Relatedly, don't just roll over when a non-expert seeks to give a "lay opinion," as lay opinion testimony under Rule 701 is often misused. *See, e.g., United States v. Garcia*, 291 F.3d 127 (2d Cir. 2002) (reversing drug conviction where informant wrongly was permitted to offer lay opinion that defendant knew and understood that conversation which, on its face, concerned asbestos job was actually coded discussion of drug transaction). Likewise, beware of otherwise inadmissible expert testimony masquerading as lay opinion testimony. *Bank of China v. NBM LLC.*, 359 F.3d 171 (2d Cir. 2004).

INTIMIDATION OF DEFENSE WITNESSES

The government's awesome power expresses itself in myriad ways, including bringing pressure to bear on potential defense witnesses. The line between ethical trial preparation and unethical intimidation of defense witnesses in derogation of the defendant's right to a fair trial is not always clear. You should be alert to any effort to "scare" a potential witness into changing his/her testimony or not testifying at all and immediately give the offensive conduct a public airing. *See Hemstreet v. Greiner*, 2004 USApp LEXIS 9148 (2d Cir. 5/11/04); *United States v. Williams*, 205 F.3d 23 (2d Cir. 2000).

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"BACKROUND EVIDENCE"

Prosecutors seem to think that the term "background evidence" is a way around virtually any hearsay obstacle ("it's not coming in for its truth, it's coming in as background evidence"), and there are, in fact, many cases that admit evidence using this rationale. Generally, such testimony may be admitted if (1) "the non-hearsay purpose by which the evidence is sought to be justified is relevant," and (2) "the probative value of this evidence for its non-hearsay purpose is [not] outweighed by the danger of unfair prejudice resulting from the impermissible hearsay use of the declarant's statement." *Ryan v. Miller*, 303 F.3d 231 (2d Cir. 2002). As *Ryan* makes clear, however, the theory has its limits, and the court there granted a habeas petition to a defendant convicted of murder in state court where the trial judge admitted as "background" evidence testimony that the officer interrogating defendant was told to read defendant his rights after questioning the codefendant – the clear implication being the codefendant had implicated the defendant.

404(B) EVIDENCE

Another darling of the prosecutor is 404(b) evidence. As everyone knows, once the jury is aware of your client's previous record s/he's generally dead meat. Notwithstanding the "inclusory" approach taken to such evidence you can still successfully fight its admission. One way of doing so is to concede the element of the offense for which the 404(b) evidence is offered. This course, however, is fraught with danger, as the cure can be worse than the disease. You should also keep in mind that where 404(b) evidence is used to show knowledge or intent the "other crimes evidence" must concern conduct similar to that charged. *United States v. Garcia*, 291 F.3d 127 (2d Cir. 2002)("The government may not invoke Rule 404(b) and proceed to offer, carte blanche, any prior act of the defendant in the same category of crime. The government must identify a similarity or connection between the two acts that makes the prior act relevant to establishing knowledge of the current act").

USE OF SACRCASM ON CROSS OK

Next time the government objects to your killer cross as wrongly conveying sarcasm and ridicule, you can respond that the Second Circuit has found them both to be legitimate tools of the cross-examiner. *United States v. Salerno*, 974 F.2d 231, 241 (2d Cir. 1992), vacated on rehearing *en banc*, *United States v. DiNapoli*, 8 F.3d 909 (2d Cir. 1993) (Newman)

COCONSPIRATOR STATEMENTS UNDER 801(D)(2)(E)

Coconspirator statements are the bane of our existence, and beyond the usual arguments ("not in the course or in furtherance of...") there often is little you can do to keep them out. Sometimes, however, there is a dearth of evidence that the client was involved other than the statement itself. It is true that the statement may be considered when determining whether the government has met its burden of demonstrating, by a preponderance, that the client was a member of the conspiracy (B*ourjaily v. United States*, 483 U.S. 171, 175-76 (1987), but it is not sufficient. The government still must proffer some independent evidence of the client's knowledge of and participation in the conspiracy before the statement is admissible. *United States v. Tellier*, 83 F.3d 578, 580 (2d Cir. 1996)(reversing RICO and Hobbs Act convictions).

JURY INSTRUCTIONS

You are entitled as a matter of right to an instruction on any theory of defense supported by evidence. *See United States v. Paul*, 110 F.3 869 (2d Cir. 1997) (conviction for possession ammunition by convicted felon reversed because instruction upon duress defense was wrongly denied).

You are entitled as a matter of right to an instruction not to consider a testifying codefendant's guilty plea as evidence of guilt, as well as to a strong charge warning the jury to scrutinize with care a cooperator's testimony. *United States v. Prawl*, 168 F.3d 622 (2d Cir. 1999).

You are only rarely entitled to a missing witness instruction, but even if you are not, the court should not instruct the jury that it may draw a negative inference against either party for the failure to call a particular witness where the circumstances suggest equal availability. *United States v. Caccia*, 122 F.3d 136, 139 (2d Cir. 1997).

DELIBERATIONS

It is now accepted that courts have discretion to give jurors actual transcripts of testimony during deliberations, with appropriate cautionary instructions. *United States v. Escotto, 121 F.3d 81 (2d Cir. 1997).*

You are entitled to see all juror questions (which do not convey forbidden information such as the present vote), have each marked as a court exhibit and be informed of any contemplated response by the court. *United States v. Mejia*, 356 F.3d 470 (2d Cir 2004) (reversing cocaine conviction because court responded *ex parte* to juror note).