



Smoking justice

Clients and their attorneys should conduct themselves in trial as if they are under surveillance because, in a very real sense, they are

BY DANIEL J. KELLY

"In the halls of justice all the justice is done in the halls." – Lenny Bruce

Those of you with long memories will recall when smoking was allowed nearly everywhere, including in public buildings.

As a young lawyer I smoked, particularly when in trial. Courthouses then had large standing ashtrays throughout the hallways.¹

In a trial in Oakland, I was pitted against the senior partner of a large East Bay law firm who had at least twenty-five more years' experience than me. As the trial was nearing completion of the evidence the defense had one last witness to call – their examining orthopedic surgeon who was scheduled for 1:30 p.m. Consistent with his medical report I expected him to minimize my client's knee injury and attribute his surgery to pre-existing arthritis and not to the accident trauma.²

While at lunch I remembered one item of evidence I should look at before court resumed. I thus returned early to the courthouse only to find it locked for the lunch hour (and a half, to be exact). To the right side of the locked door were approximately six jurors, most of whom were smoking. I waited off to the left side of the door and decided to smoke an after-lunch cigarette. In front of the jurors and me was the floor's hallway and elevator lobby. Pacing in front of the lobby elevators was my opponent. I knew he was awaiting the arrival of his witness, Dr. Charles Hughes.³

Within a few minutes the elevator doors opened and out came the doctor, who greeted defense counsel by saying, "Hi Fred, sorry I'm a bit late." My opposing counsel said, "Come with me, Charlie," and proceeded to lead him to a

witness room. While walking there the doctor said, "So how did Mildred like the anniversary cruise?" Into the room they went.

When court resumed the good doctor was called to the stand and testified on direct examination as expected. As part of my cross-examination I asked if the doctor was friends with defense counsel, and he replied, "No." I then asked if they were on a first name basis and got the same answer.

The next question: "So, you don't call him Fred and he doesn't call you Charlie?" prompted another "No." Following up I said, "If I told you his wife's name is Mildred would that mean anything to you?" He responded, "I don't know his wife's name."

I knew full well that what I witnessed and heard over a cigarette in the lobby was also likely witnessed and heard by the six jurors. Thankfully, my client received a verdict in his favor and, telling from its amount, it was not discounted by any of Dr. Hughes' testimony.

As it turned out, the foreperson of the jury was one of the hallway smokers. After the verdict I talked to her and she confirmed that she and five of her colleagues witnessed the lobby colloquy and were incensed by the doctor's complete, under oath, denial of any of its contents to the point that the jury discredited the entire defense case.

I returned to the courtroom, packed up my briefcase,⁴ walked out into the hall and had a celebratory cigarette. I no longer smoke⁵ but that post-trial cigarette was one I truly enjoyed and fondly remember.

As the above true scenario illustrates, it needs to be explained to clients that during a jury trial they are truly Exhibit "A" and attorneys must be mindful that they are Exhibit "B." Jurors pay close

attention to both even outside of the courtroom, be it in the halls, the parking garage or, even worse, jaywalking across the street to get to the courthouse.

Clients and their attorneys should conduct themselves in trial as if they are under surveillance because, in a very real sense, they are being watched by a surveillance team of twelve, plus a few alternates to boot.

Daniel J. Kelly is a retired partner from the San Francisco firm of Walkup, Melodia, Kelly & Schoenberger where he specialized in representing plaintiffs in personal injury litigation and the mediation of personal injury cases. Mr. Kelly is a past president of the San Francisco Trial Lawyers Association, and is a member of the American College of Trial Lawyers, the American Board of Trial Advocates, the International Academy of Trial Lawyers and in 2003 was President of the International Society of Barristers. For years he co-authored the Rutter Group's three volume Personal Injury Practice Guide.



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Endnotes:

¹ When smoking in public buildings was prohibited, one Superior Court Judge, a smoker, proclaimed he had quit. Granted, he had no ashtrays in his chambers, which probably explains the fire that broke out in his wastebasket.

² The treating orthopedist had testified the surgery was due to the trauma.

³ The true names of the doctor and defense counsel are not given here. Thus, they are nameless, but not blameless.

⁴ Yes, in those days it was possible to try a lawsuit using a briefcase.

⁵ November 6, 1986, at 5:30 p.m. was my last one. I had it over a cocktail. That was not, however, my last cocktail. When humorist Robert Benchly was warned that drinking is a slow poison, he responded: "So who's in a hurry?"

