

“There I was, surrounded by the enemy...”

by Dan Christensen

When I was an officer candidate in the Army, I had an old, crusty Sergeant Major who always used to entertain us young, eager soldiers with war stories from Vietnam. Out in the field, we would sit on the ground silently listening to Sergeant Major’s tales about heroic feats of valor. He would stand there leaning up against his big, carved, walking stick delivering his stories from behind a cloud of cigar smoke circling around his leathery face. None of us ever really knew whether any of his stories were true or not, but we suspected they may not be since veterans who have experienced the true horrors of combat typically can not, or do not, talk about it. Nevertheless, the stories were interesting and captured our attention for hours. This old Sergeant Major story teller would always start his tales with the same phrase, “There I was, surrounded by the enemy.”

This phrase suddenly leapt into my mind when Juror 7 accused me of dishonesty in front of my entire venire. I was trying a car wreck case where the defendant had struck my client and then left the scene. Knowing that one of my state supreme court’s favorite past times was to chastise plaintiff lawyers who lay out their entire case during voir dire, I decided to disclose only the bare minimum facts necessary to orient the jury to the nature of the case. One of these facts was that the defendant had fled the scene.

About mid-way through my voir dire, Juror 7 decided that my choice to disclose the fact that the defendant fled the scene was an illicit, sneaky way to try to sell my case to the jury. “I think it is unethical and wrong for you to just tell us some of the facts, the facts that you want us to know, so that we will find for your client” she said. She

continued, “You should not have told us that. There is no need for us to know that right now. I mean, how do I know there are not things you are not telling us because you don’t want us to know.”

It is not that I particularly cared so much about Juror 7 for she had disqualified herself on other bases long before she launched her attack on me. What caused my heart to race and my hands to tremble was that she was conducting her offensive in front of all of my other potential jurors, some of whom would certainly be sitting on my case. Just as concerning was the pleasure she took in it. She volunteered her judgment that I lacked all credibility without even being asked a question and she showed no signs of letting up.

After Juror 7’s initial assault, there was what seemed to be an hour or two of silence. This silence probably only lasted a second or two in reality, but at that point I had lost all comprehension of time. Breaking through the silence was a cough by my client. A shuffling of papers by my co-counsel. An uncomfortable gulp by me. I looked around and all the jurors just looked back. I truly felt as though I was surrounded by the enemy.

I thought, “What would Sergeant Major do?” Because I did not have my weapon or a grenade with me, had to come up with another plan. Then, it came to me. I thought of another great mentor of mine, Gerry Spence. I had been privileged enough to spend time with Spence at some of his courses, including his Trial Lawyer’s College in Wyoming. Spence always said not to be scared when a juror drops a bomb during voir dire because the other jurors will always come to your rescue.

Before asking for such rescue, however, I had to accomplish some damage control. First step: do what a normal person, not a defensive lawyer, would do. I apologized: “I am so sorry I gave you that impression. That was truly not my intent.” It was not hard to appear sincere in saying this because I honestly could not have been more sorry that she, of all people, got that impression...and then shared it in a very vocal manner in front of my entire panel. But, even after my apology, Juror 7 did not seem satisfied. I could tell she still had unfinished business with me, so I quickly went to step two.

Step two: validate and identify with her feelings. Slowly, I empathized, “I can understand why you might think that, though. I wrestled for a long time trying to decide what facts to disclose and what not to. It was a hard decision for me, but I thought it would be best to get that fact out there.” I could see her start to soften. Now, Juror 7 and I had the same concerns; something in common. My response was clearly not what she expected, but I had not made her Christmas card list yet.

Finally, I did what Spence told me to do and that was to turn it over to the panel and let them save me. I asked, the group, “Why would it be important for us to discuss the fact that the defendant fled the scene?” One after the other, the juror’s raised their hands offering reasons why it was a good idea. Some of the reasons were things I hadn’t even thought of, but were just as compelling. My actual reason for disclosing that fact was to try to inoculate the panel against causal challenges by the defense because I knew the defense would bring it up if I didn’t. Regardless, after a few jurors explained my dilemma and solution, I could see that Juror 7 was satisfied and we moved on.

Credibility is everything in trial. My credibility with this jury came dangerously close to being obliterated in a mere moment. Throughout the rest of trial, I wondered if I had regained their trust and confidence. After the jury awarded over \$1 million on my soft-tissue case, I knew the answer was yes. Spence was right again.